SUPREME COURT, U. S.

JAN '21 1953

Supreme Court of the United States

October Term, 1952

No. [illegible]

THE CITY OF LOS ANGELES, a municipal corporation, [illegible]

Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, [illegible]

Appellees.

On Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

[illegible]

Of Counsel:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. .....

THE CITY OF LOS ANGELES, a municipal corporation, the CITY OF LONG BEACH, a municipal corporation, ROGER ARNEBERGH and WALHFRED JACOBSON,

Appellants,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and C. LYN FOX, PETER E. MITCHELL, MATTHEW J. DOOLEY, THEODORE H. JENNER and EVERETT C. McKEAGE, as members of and constituting the said Public Utilities Commission,

Appellees.

On Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

This is an appeal from the judgment of the Supreme Court of the State of California entered on May 21, 1958, in the proceeding, as above-entitled, under that Court's S. F. No. 19900.

That judgment denied the appellants' request for a writ to review the order, Decision No. 55936, of the appellee, the Public Utilities Commission of the State of California (the "Commission").

The California Supreme Court rendered no opinion, but the effect of its judgment is that the Constitution of the United States does not guarantee to customers of regulated public utilities the right to a due process hearing in

connection with a final State administrative determination that they must pay increases in utility charges. Consequently, the judgment conflicts with this Court's decisions in *Wichita Railroad & Light Co. v. Public Utilities Commission* (1922), 260 US 48, 67 L ed 124, 43 S Ct 51, and in *Hollis v. Kutz* (1921), 255 US 452, 65 L ed 727, 41 S Ct 371.

The Commission's order authorized increases of approximately $1,250,000 per month in telephone charges by four public utility corporations[1] to their subscribers in the Los Angeles area. A proceeding had just commenced before the Commission upon a rate increase application by one of the companies. Without prior notice and contrary to the Commission's existing general orders and established rules of procedure, the other three companies joined with the applicant company in a motion for increased charges by all of them, solely in the Los Angeles area. (Two of the companies had not even filed applications for increased rates.)

Cross-examination on the essential issues was not completed. Evidence from the Commission's own staff, or from the appellants or other affected subscribers was not received, and the essential issues were not determined.

Moreover, the California Commission admits that the Constitution guarantees a full and fair hearing to a utility before its interests are adversely affected, and it uniformly grants utilities such a hearing before decreasing rates.

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[1]The Pacific Telephone and Telegraph Company, General Telephone Company of California, California Water & Telephone Company and Sunland-Tujunga Telephone Company. These corporations appeared as respondents below, under Public Utilities Code Section 1758, and service is made on them herein as if they were appellees.

Nevertheless, claiming power to authorize increased utility charges *ex parte,* the Commission authorized the requested increases.

Although the order was designated as "interim" pending the completion of the proceedings, the authorized increases were not conditional and there was no provision for refunds if the Commission's subsequent final order, after all evidence had been received, should determine that they had not been justified.

On May 6, 1958 (by Decision No. 56652, 56 Cal. PUC 277, 23 PUR 3d 209), after further proceedings, the Commission affirmed and ratified its interim decision, effective May 27, 1958.

The prospective effect of the Commission's May 6th decision is not involved here. But the increased charges were effective from January 20, 1958, until May 27, 1958, solely by force of the interim order, so during that four-month period the affected telephone subscribers were required to pay the telephone corporations more than $5,000,000 in increases of telephone charges.

Decision No. 55936 thus denied equal protection of the laws to the affected telephone subscribers and deprived them of their properties without due process of law. These propositions were urged to the Court below, and previously to the Commission. Since that decision is here equivalent to a statute, the denial of the appellants' petition that the California Supreme Court review and annul Decision No. 55936 brings the propositions here that the appellants and those they represent as affected telephone subscribers have been deprived of their properties by State action without due process of law and that they have been denied the equal protection of the laws, contrary to the

Fourteenth Amendment to the Constitution of the United States.

The appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal, and that the questions presented are substantial.

Opinion Below.

The judgment of the Supreme Court of the State of California, here sought to be reviewed, was rendered without opinion. It is reported in 50 Advance California Reports, No. 8, Minutes, page 2, and a copy is attached as Appendix A.

The Commission's Decision No. 55936 is reported at 56 Cal. PUC 80, and a copy is attached as Appendix B.

Jurisdiction.

Under Section 1759 of the California Public Utillties Code (Appendix G, p. 78), the Supreme Court of California is the only court which has jurisdiction to review an order or decision of the Commission. Consequently, after their timely petitions for a rehearing[2] had been denied by the Commission,[3] and within the time provided by Section 1756 of the California Public Utilities Code (Appendix G, p. 77), the appellants applied to the Supreme Court of California for review of Decision No. 55936.

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[2]The Los Angeles-Arnebergh petition is attached as Appendix C. The Long Beach-Jacobson petition is attached as Appendix D.

[3]The Commission's decisions, No. 56048 and No. 56049, denying a rehearing, are attached as Appendices E and F.

The judgment of the Supreme Court of California denying review (Appendix "A") was entered on May 21, 1958.

The appellants' notice of their appeal to this Court from that judgment was filed on August 15, 1958, with the Clerk of the California Supreme Court.

On September 24, 1958, upon the appellants' application, the California Supreme Court entered its order enlarging the time for docketing this case on appeal until sixty days after the final determination by that Court of a connected proceeding under that Court's S. F. No. 20007.

Such sixty day period has not passed: on November 26, 1958, the California Supreme Court entered its order denying the petition in such proceeding, S. F. No. 20007.

The jurisdiction of this Court is invoked under 28 United States Code, Section 1257(2): the appellants' petition to the Supreme Court of California having drawn in question the validity of the Commission's Decision No. 55936 on the ground that such decision was repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, such Decision No. 55936 being equivalent to a statute of the State of California for purposes of this Court's jurisdiction on appeal, and the decision of the California Supreme Court being in favor of the validity of such Commission decision.

The following decisions sustain the jurisdiction of this Court to review the judgment below on direct appeal:

> *Atchison, Topeka & Santa Fe Railway Co. v. Public Utilities Commission* (1953), 346 US 346, 348, 98 L ed 51, 58, 74 S Ct 92

Live Oak Waters Users' Assoc. v. Railroad Com. (1926), 269 US 354, 356, 70 L ed 305, 308, 46 S Ct 149

Lake Erie & W.R. Co. v. Public Utilities Com. (1919), 249 US 422, 424, 63 L ed 684, 687, 39 S Ct 345

Such state statute, Decision No. 55936, 56 Cal. PUC 80, the validity of which is here involved, is Appendix B.

Constitutional Provisions and Statutes Involved.

The constitutional and statutory provisions involved are Section 1 of the Fourteenth Amendment to the Constitution of the United States, Sections 22 and 23 of Article XII of the Constitution of the State of California, and Sections 20, 216, 304, 310, 451, 453-455, 489-491, 701, 728, 729, 734, 735, 1001, 1701, 1702, 1705-1707, 1709, 1731-1733 and 1756-1761, of the Public Utilities Code of the State of California. They are printed in their pertinent parts in Appendix G, *infra,* pages 67 to 79.

Under the statutory scheme a Commission order increasing telephone charges is final until the Commission makes a different determination, unless it be annulled by the California Supreme Court upon review, and after denial of such review no relief therefrom can be obtained except by this Court's determination that the order violates rights guaranteed by the Constitution of the United States.

Question Presented.

Does the due process provision of the Fourteenth Amendment to the Constitution of the United States protect utility customers so as to entitle them to a hearing by a State public utilities commission before such commission may authorize increases in the charges which the customers must pay for the utility's services, in cases where:

(a) by State law the customers are denied an opportunity to obtain substantially similar services elsewhere;

(b) the State law does not provide for any judicial trial of the issues, or for conditional increases pending a hearing before the Commission *and* for refunds of such increases according to a subsequent determination upon such hearing, and

(c) otherwise under State law the commission's "interim" order of authorization is final and conclusive upon the affected customers, as to the increases which become due, owing and payable according to the "interim" order of authorization?

Or, as the appellee Commission asserted to the Supreme Court of California, is it a "fanciful contention that a customer of a utility has a constitutional or statutory right to notice before the Commission, lawfully, may increase the rates of the utility," and, as further contended by the appellee commission, does the Fourteenth Amendment consequently insure due process only to the public utility corporation in a State commission rate proceeding and *not* to the customers of the utility?

Statement.

The judgment below denied (without opinion) a review of the Commission's Decision No. 55936. The record before the court comprised the appellants' verified petition, the unverified answers of the Commission and the telephone companies and the appellants' verified reply thereto. Essentially the answers raised legal issues. To the extent that they urged factual assertions in denial or avoidance, they were traversed by the appellants' reply, so that the judgment resolved legal issues solely. Upon this appeal from that judgment, the facts are established by the appellants' petition below. In summary:

Telephone service is necessary to individuals and business within the Los Angeles area. Telephone service in the Los Angeles area is monopolistic, by State policy and authority. Telephone charges to subscribers in California are fixed by State action. Thus, in the Los Angeles area one must obtain telephone service from one or the other of the four telephone companies specified by State action, and must pay that company's charges.

Under these circumstances increases in charges to telephone subscribers by State authority operate to deprive the subscribers of their property and they are entitled under the Fourteenth Amendment to a due process hearing before any such increase can validly be finally effected.

Before the Commission's Decision No. 55936 California telephone subscribers had generally been accorded a due process hearing before increases in charges to them were authorized by State action.

That decision was rendered in proceedings which included an application by one of the companies (Pacific) for authority to increase its charges. That application

was filed and the proceeding thereon was going forward upon notice and according to the Commission's general orders and rules of procedure.

During an initial hearing upon that application Pacific and the other companies moved, without prior notice and in derogation of the Commission's general orders and rules of procedure, for "interim" authority to increase their charges for certain interchanged services, in the Los Angeles area solely.

By the Commission's Decision No. 55936 such increases in charges to telephone subscribers in the Los Angeles area[4] were effected with finality by State action, without a full hearing, and the appellants and the other subscribers whom they represent were thus deprived of their properties without due process of law.

By that Decision No. 55936 exchange telephone charges for multi-message unit calls in the Los Angeles area were authorized to be increased by more than $15,000,000 per year. The decision did not authorize or require any decreases in other charges, and the authorized increases thus added a net cost burden of $15,000,000 to that previously carried by the affected subscribers.

The Commission designated its decision as "interim" but it made no provision therein for any subsequent adjustment or for any refunds to the affected subscribers.

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[4]Specifically, the Commission's Decision No. 55936 authorized increases in exchange telephone "multi-message unit" charges throughout the "Los Angeles Extended Area." That area is approximately the same as the Los Angeles metropolitan area: it extends over portions of the Counties of Los Angeles and Orange and includes the cities of Los Angeles and Long Beach as well as other cities and urban areas within the Los Angeles metropolitan area. References herein to the Los Angeles area are to such Los Angeles Extended Area.

Thus the increases authorized were not actually provisional or temporary—they were finally effective until further order of the Commission. No more could be said of any order increasing rates.[5]

Despite the appellants' protests, these increases in charges were authorized by the Commission, pursuant to mere motions, without there being a sufficient proceeding or defined issues before the Commission, without adequate notice of the proposal to the appellants or the subscribers they represent, without opportunity for the subscribers to prepare their case, without evidence from the Commission's own staff or from any parties other than the movant companies, without an adequate opportunity for cross-examination, without evidence upon all essential issues, without adequate findings by the Commission, and otherwise without according a full due process hearing to the affected subscribers.

Moreover, the California Commission grants a full and fair hearing to a utility corporation before it requires rates to be decreased, and since Decision No. 55936 deprived the telephone subscribers of their properties without due process of law it thus also denied them the equal protection of the laws.

Consequently, the appellants sought review from the Supreme Court of California, but that Court denied their petition to bring up the record so that the Commission's decision might be annulled.

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[5]The authorized increases were made effective on January 20, 1958. By Commission order, Decision No. 56109, dated January 17, 1958, such records are required to be kept by the telephone companies involved that refunds to the customers may be made following the annulment of Decision No. 55936.

The appellants' petition rested upon the fact that the Commission had authorized increased charges to them and to the subscribers they represent without first according a due process hearing, and upon the appellants' claims that the California statutes and the Fourteenth Amendment alike required the Commission to complete a due process hearing before it should be empowered to authorize increases in charges to telephone subscribers.

Thus, the judgment of the California Supreme Court precisely sustains the validity of the Commission's Decision No. 55936 and holds that the Fourteenth Amendment does not entitle the appellants and the telephone subscribers they represent to be heard upon final increases in telephone charges to them, by State authority, although the telephone utility corporation enjoys a monopoly under a grant of privilege by connected State action.

There is no room for any suggestion that the federal question does not survive to this Court. Since the appellants' petition was denied without a hearing or a review of the record before the Commission, the judgment of the California Supreme Court assumed the facts alleged by the appellants and determined their insufficiency as a matter of law. There was only one basis for an independent determination of such insufficiency on state grounds: it lay in the Commission's suggestion that the appellants' petition was premature, but that suggestion has been laid to rest beyond all question in subsequent state proceedings.[6]

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[6]In order to settle this procedural question a second petition for review was filed under S. F. No. 20007. That petition was denied by the California Supreme Court after the Commission and the telephone companies had pleaded as *res judicata* the judgment of May 21, 1958, from which this appeal is taken.

Although the appellants' petition to the California Supreme Court urged their due process entitlements under the California statutes as well as under the Fourteenth Amendment, the federal question survives, since the judgment of the Court below necessarily expressed its determination that the appellants had no rights at all—that captive public utility customers have no right to a hearing either under the California statute or under the Fourteenth Amendment.

In the proceedings below the appellant cities appeared in behalf of industrial, commercial and residential subscribers within their boundaries and in effect in behalf of all of the subscribers within the Los Angeles area who would otherwise have been without representation.

The appellants Arnebergh and Jacobson appeared before the Commission as individual subscribers when the Commission's outright denial of due process rights was manifested by its Decision No. 55936: they then immediately urged such denial and petitioned for a rehearing by the Commission upon that ground.

The appellants' petition for review by the California Supreme Court was necessarily brought by them in similar representative capacities and their appeal to this Court is in behalf of all telephone subscribers within the Los Angeles area.[7]

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[7]The fact is obvious that the individual Arnebergh and Jacobson appearances were originally motivated and that they continue to be motivated by the purpose that the essential issues herein be heard and determined on the merits, against quibbles by the appellees that municipal corporations may not urge federal due process claims in their own behalf.

How the Federal Question Was Raised.

The question under the Fourteenth Amendment, of the deprivation of property without due process of law from the appellants and from the other telephone subscribers within the Los Angeles area, was raised at once to the California Supreme Court by the appellants' petition to that Court for review of the Commission's Decision No. 55936.

(1) The appellants Los Angeles and Roger Arnebergh initially raised that question by the incorporation of their petition to the Commission for a rehearing (Pet., Appendix "B," pp. 21-41 [Appendix C hereto, pp. 25-45]), where at pages 25, 30-32 and 35 (pp. 29, 34-36 and 39 of Appendix C hereto) they had specifically asserted the Commission's violation of their Fourteenth Amendment rights in its denial of a due process hearing.[8]

(2) The appellants Long Beach and Walhfred Jacobson initially raised that question by the incorporation

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[8]"Finally, this petition is based upon the 14th Amendment to the Constitution of the United States . . ." (Appendix C hereto, p. 29.)

"An increase in charges to telephone subscribers without such a finding and determination effectively deprives them of their property without due process of law.

"Due process of law, under the 14th Amendment and according to historical concepts of ordinary justice and equity, require that issues be framed in a proper proceeding; that due and adequate notice of hearings be given, that witnesses be publicly examined; that those who would be adversely affected have a full opportunity for cross-examination; that there be an adequate opportunity to prepare and present material, competent and relevant evidence. But due process of law was not followed before the issuance of Decision No. 55936, purporting to authorize the interim increase. Consequently,

of their petition to the Commission for a rehearing (Pet. Appendix "D," pp. 51-60 [Appendix D hereto, pp. 47-56]), where at pages 52, 53 and 58 (pp. 48, 49 and 54 of Appendix D hereto) they had specifically asserted the Commission's violation of Fourteenth Amendment rights in its denial of a due process hearing.[9]

It should be noted that the denial by the Commission of Long Beach's and Jacobson's Fourteenth Amendment rights had been absolute, as was shown in their petition for a rehearing (Par. 5, Appendix "D" hereto, p. 54).

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if such increase is permitted to go into effect, all ratepayers in the Los Angeles extended area will be unconstitutionally deprived of property without due process of law!" (Appendix C hereto, pp. 34-35.)

"The accomplishment of such a discriminatory result without a full and adequate hearing effectively deprives the affected subscribers of their property without due process of law, by compelling them to pay excessive and exorbitant telephone rates without having a fair opportunity to be heard." (Appendix C hereto, p. 36.)

[9]"The Commission lacked jurisdiction and acted without authority in making its interim order contained in Decision No. 55936 in the absence of a full-scale hearing on the operations of all four companies in connection with applications by all for rate increases." (Appendix D hereto, p. 48.)

"That said Decision No. 55936 is violative of that portion of Section 1 of the 14th Amendment to the United States Constitution which reads as follows: '. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'" (Appendix D hereto, p. 49.)

"As was very clearly and fully developed at the hearing on this motion in San Francisco, no notice was given to the ratepayers in General's service area with respect to the hearing on said motion. . . . This lack of notice and lack of adequate opportunity to cross-examine the witnesses testifying in support of said motion, in the opinion of your Petitioners, clearly constitutes a violation of constitutional rights guaranteed by the 14th Amendment to the Constitution of the United States . . . and has deprived your Petitioners of their aforesaid constitutional rights." (Appendix D hereto, p. 54.)

Telephone subscribers served by the Pacific Telephone and Telegraph Company in the Los Angeles area had at least received notice of Pacific's application for a general rate increase and of the initial hearing thereon,[10] but no notice whatever had been given to Long Beach or to Walhfred Jacobson and the other subscribers served by General Telephone Company of California that General's motion for increased rates within Long Beach and elsewhere would be entertained by the Commission.

(3) Los Angeles, Arnebergh, Long Beach and Jacobson, in their own behalf and in behalf of the other telephone subscribers throughout the Los Angeles area, further explicitly raised the due process question under the Fourteenth Amendment throughout the body of their joint petition to the California Supreme Court (see the record herein), and specifically at pages 2, 4, 5-7, 8, 9, 11, 12, 14, 19, 26, 27, 33-42, 45 and 46.[11]

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[10]However, they had no notice that the Pacific Company, much less the other three companies, would move for an "interim" increase, either at this initial hearing or at all.

[11]". . . (under the) Constitution . . . the Commission may not authorize any such increase in subscribers' telephone charges except: . . . (upon issues framed, after a full public hearing upon notice, upon substantial evidence, after an opportunity, following adequate notice, to cross-examine utility witnesses and to prepare and adduce evidence, and upon adequate findings). None of this was done." (Pp. 5-6.)

The principal question presented by the petition was introduced as follows:

"May the Public Utilities Commission, under the Constitution and statutes of the State of California, and consistently with the due process clause of the Fourteenth Amendment to the Constitution of the United States, entertain and grant a motion resulting in an 'interim' order for substantial increases in telephone rates: . . . (without completing a hearing thereon with all of the incidents of due process)?" (Pet. p. 8.)

The Fourteenth Amendment question was again urged specifically, at pages 3-9, 16-29, 33, 35-39, and 48-57, of the appellants' reply to the answers of the Commission and the telephone companies. In the submission of that reply the appellants said in part:

> "As has been shown under Point II of this reply, the Fourteenth Amendment and the decisions of the Supreme Court of the United States (notably in *Wichita Railroad & Light Co. v. Public Utilities Commission of the State of Kansas* (1922), 260 US 48, 67 L ed 124) establish due process rights in consumers, apart from any statute.
>
> "Due process requires a full hearing. There was not a full hearing here, as the Commission's answer and Decision No. 55936 itself clearly show. Consequently, the writ prayed for should issue, and upon its review of the whole record, this Court should annul the Commission's Decision No. 55936." (Reply, pp. 56-57, record herein.)

The judgment of the California Supreme Court (Appendix A) denied, without opinion, the appellants' petition for review, and thereby categorically rejected the appellants' Fourteenth Amendment claims.

By such judgment the California Supreme Court necessarily concluded and determined that the Fourteenth Amendment does not establish any rights in public utility customers to be heard upon proposals that the utility's charges to them be increased by State action. Moreover, it is obvious that if public utility customers have no constitutional right to be heard upon rate increase proposals, they have no right to be heard in any connection

with respect to State action in the establishment and regulation of privately owned public utilities, or with respect to franchise grants to such utility corporations.

Since the Commission's Decision No. 55936 was drawn in question by the appellants' petition to the California Supreme Court on the ground of its being repugnant to the Fourteenth Amendment, since such decision is equivalent for jurisdictional purposes to a statute of the State of California, and since the judgment below of May 21, 1958, favored the validity of that decision against the appellants' claims, this Court has jurisdiction on appeal, under 28 United States Code Section 1257(2), to review that judgment of the California Supreme Court.

ARGUMENT.

The Federal Questions Are Substantial.

1. The issues involved in this appeal are vital to every telephone, gas, electric power, water and other utility customer, and thus to nearly every person in the nation.

They involve the right of the ordinary citizen to protection by the Fourteenth Amendment in matters which concern his daily life.

In this respect this case is almost unique. Causes in this constitutional area brought to this Court on behalf of individual people usually involve pleas by persons charged with serious crimes or suspected of subversive conduct. This Court seldom has an opportunity to make it clear that constitutional guarantees extend also to the ordinary law-abiding and productive citizen, that they protect every

person, whether he be accused of wrongful acts, or whether, as here, he asks only that a State administrative commission give him a full hearing before it increases the prices he must pay to the private corporation with which the State requires him to deal for his necessities.[12]

The Constitution is, of course, not less solicitous of rights in property than of rights of speech, belief or conduct (*Shelley v. Kraemer* (1948), 334 US 1, 92 L ed 1161, 68 S Ct 836).

The fact that such a cause as this one is infrequent underscores the fact that there has previously been almost

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[12]As this Court said in *International Brotherhood v. Vogt* (1957), 354 US 284, 287, 1 L ed 2d 1347, 1349, 1350, 77 S Ct 1166, "It is inherent in the concept embodied in the Due Process Clause that its scope be determined by a 'gradual process of judicial inclusion and exclusion,' *Davidson v. New Orleans*, 96 US 97, 104, 24 L ed 616, 619. Inevitably, therefore, the doctrine of a particular case 'is not allowed to end with its enunciation and . . . an expression in an opinion yields later to the impact of facts unforseen' *Jaybird Min. Co. v. Weir*, 271 US 609, 619, 70 L ed 1112, 1117, 46 S Ct 592 (Brandeis, J., dissenting.)" And see—*Sweezy v. New Hampshire* (1957), 354 US 234, 266, 1 L ed 2d 1311, 1333, 77 S Ct 1203. The decisions of this Court, by their inclusions within the due process concept, demonstrate this Court's concern for the constitutional guarantees accorded to the individual who is directly confronted by exercises of State power, as, for example, among recent cases, in *Speiser v. Randall* (1958), 357 US 513, 2 L ed 2d 1460, 78 S Ct 1332; *Payne v. Arkansas* (1958), 356 US 560, 2 L ed 2d 975, 78 S Ct 844; *Yates v. United States* (1957), 354 US 298, 1 L ed 2d 1356, 77 S Ct 1064; *Sweezy v. New Hampshire* (1957), 354 US 234, 1 L ed 2d 1311, 77 S Ct 1203; *Watkins v. United States* (1957), 354 US 178, 1 L ed 2d 1273, 77 S Ct 1173; *Konigsberg v. State Bar* (1957), 353 US 252, 1 L ed 2d 810, 77 S Ct 722, and *Schware v. Board of Bar Examiners* (1957), 353 US 232, 1 L ed 2d 796, 77 S Ct 752 (cf *Re Summers* (1945), 325 US 561, 89 L ed 1795, 65 S Ct 1307); *Fikes v. Alabama* (1957), 352 US 191, 1 L ed 2d 246, 77 S Ct 281; *Slochower v. Board of Higher Education* (1956), 350 US 551, 100 L ed 692, 76 S Ct 637; *Wieman v. Updegraff* (1952), 344 US 183, 97 L ed 216, 73 S Ct 215 and *Rochin v. California* (1952), 342 US 165, 96 L ed 183, 72 S Ct 205, 25 ALR 2d 1396.

universal recognition that the Constitution protects utility customers as well as utility corporations.

But when that principle is categorically denied in a cause before this Court, as it is here, apparently for the first time in more than thirty years, a federal question of the highest importance is presented.

General recognition of this principle has heretofore been compelled by the decisions of this Court in *Hollis v. Kutz* (1921), 255 US 452, 65 L ed 727, 41 S Ct 371, and in *Wichita Railroad & Light Co. v. Public Utilities Commission* (1922), 260 US 48, 67 L ed 124, 43 S Ct 51.

In *Hollis* this Court recognized that individual utility customers have constitutional standing, although on the merits it held that more favorable rates to the government did not deny them equal protection. And in *Wichita* this Court directly determined, according to fundamental constitutional principles,[13] that the exercise of governmental authority to grant a monopolistic privilege to a public utility corporation constitutionally requires correlative protection to its customers, that both the utility corporation and the customers are deprived of property where the

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[13]In *Panama Refining Company v. Ryan* (1935), 293 US 388, 432, 79 L ed 446, 465, 55 S Ct 241, this Court cited its *Wichita* decision, quoting the language there relating to the requirement that in the delegation of legislative power the administrative agency must have enjoined upon it a certain course of procedure and certain rules of decision in the performance of its function. And there this Court also referred to its decision in *Mahler v. Eby* (1924), 264 US 32, 44, 68 L ed 549, 554, 44 S Ct 283, where it had said that in the *Wichita* case " 'We held that the order in that case made after a hearing and ordering a reduction was void for lack of the express finding in the order. We put this conclusion not only on the language of the statute but also on general principles of constitutional government.' "

price between them is determined by State action, and that the customers as well as the utility corporation are, under the Fourteenth Amendment, entitled to a fair hearing before that price is fixed by State action.[14]

Those principles are clear from *Wichita,* and no suggestion has been found that this Court has any disposition to depart from them. Nevertheless, there has been less than a unanimous understanding,[15] and now it appears that the Supreme Court of California has misconstrued this Court's determinations in *Wichita.*

2. The importance of the questions presented is further emphasized by considering the consequences if this Court were not to determine this appeal on the merits.

While this Court has warned that its dismissal of an appeal does not necessarily imply its agreement with the lower court's judgment, realities must be considered: unquestionably, dismissal here would be construed by the

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[14]This Court's *Wichita* decision may be considered as a development of the views expressed by Mr. Justice Miller in his concurring opinion in *Chicago, Milwaukee and St. Paul Railway Company v. Minnesota* (1890), 134 US 418, 460, 33 L ed 970, 982, 10 S Ct 462. From his ten propositions of public utility law, it is clear that the interposition of State action in fixing utility rates entitles customers as well as vendors to due process observance. And see *Smyth v. Ames* (1898), 169 US 466, 544, 545, 42 L ed 819, 848, 18 S Ct 418, where this Court held that a public utility corporation "performs a function of the state," and that lawfully a public utility customer can be charged only just and reasonable rates.

[15]As in *Southern Oil Company v. Yale Natural Gas Company* (1923), 89 Okla. 121, 214 Pac. 131 and *Bartlesville v. Corporation Commission* (1921), 82 Okla. 160, 199 Pac. 396; and see *State v. Rawlings* (1951), 229 Ind. 552, 99 NE 2d 597; *Lenihan v. Tri-State Telephone & Telegraph Co.* (1940), 208 Minn. 172, 293 NW 601; *Eagle-Pitcher Lead Company v. Henryetta Gas Company* (1925), 112 Okla. 65, 239 Pac. 890; *Consumers Gas Company v. Corporation Commission* (1923), 95 Okla. 57, 219 Pac. 126.

Commission, by the California courts, by California utilities and by California customers as the equivalent of affirmance. And since litigation in this field is closely watched and extensively reported, the construction would inevitably spread and be accepted throughout the nation that this Court had overruled *Wichita* and now established as the law of the land that in the field of public utility regulation the Fourteenth Amendment protects only the utility corporations—that the captive customers have no standing and are not entitled under the Constitution to notice or a hearing before they are required by State action to pay increased charges.[16]

Notice and hearing by grace or privilege are of little value, and they will not permit or encourage forthright advocacy of customer interest. There can be no doubt, if customers and their representatives come to understand that they speak without right, that customer participation in regulatory proceedings will be effectively discouraged. Most probably, as the regulatory commissions grow to believe that they have such unrestricted powers, and accordingly to have increasing faith in their own omniscience, their overt repulse of the customers will hasten the time when they will deal with the utilities' proposals in chambers.

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[16]As to recent decisions of this Court on due process notice and hearing requirements, not met below, see *Walker v. Hutchinson* (1956), 352 US 112, 1 L ed 2d 178, 77 S Ct 200; *Joint Anti-Fascist Refugee Com. v. McGrath* (1951), 341 US 123, 95 L ed 817, 71 S Ct 624 and *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 US 306, 94 L ed 865, 70 S Ct 652.

Indeed, such is the Commission's claim of power. Its short answer to the appellants' complaints that it had denied them a due process hearing was its assertion that it is empowered to authorize increased utility charges *ex parte* (Decision No. 56048, Appendix E, p. 61). The full sweep of this claim by a lay commission is best seen simply by reference to a desk dictionary, Webster's New Collegiate (1956), which defines *ex parte* thus: "Upon, from, or in the interest of, one side only."

The proposition that the Constitution protects only the utility, and not the customers, is so shocking to a sense of justice and fairness as to be incredible.

And not only does the Fourteenth Amendment provide that no person shall be deprived of property by any State "without due process of law" but it also provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." To assert that a utility is entitled under the law to a hearing before it can be adversely affected by a rate change, but that its customers are not entitled to a hearing before their rates are adversely affected, is to completely ignore the equal protection clause. It is incomprehensible that such an assertion can be seriously made.

To contend that the customers of a utility do not need a hearing because the regulatory commission will "protect" their interests (see Appendix E, p. 61) is sophistry. The correlative argument could be made with equal logic (and possibly with greater justification),[17] that a utility does

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[17]From its resources of technical and legal talent, and from its control of the business, a utility's management could present such a case to a commission *ex parte* that there would be little likelihood that the utility's interests would be overlooked.

not need a hearing because the commission will protect its interests.

But all such assertions miss the essential points that our system never tolerates unrestricted power, that the truth is best hammered out on the anvil of contention before an impartial and objective tribunal, and that until it is tested in the crucible of cross-examination, self-serving testimony can have little weight.

Properly, a state regulatory commission, such as the appellee commission, represents neither the utility nor its customers. It is the body established by law to resolve the inherent conflict between such interests. Consequently, both the utility and its customers are entitled to be heard—to due process—or proceedings before the commission become a farce.

Nor is it an answer to say, as the appellees claimed below, that government would never get its business done in this field if it had to listen to the millions of affected customers. Such a fallacious argument of necessity has had no appeal to this Court in other connections and it should have no appeal now. It is urged that the complexities of modern conditions now require short cut procedures and *ex parte* determinations, but those complexities all the more compel faithful adherence to due process principles if our liberties are to retain any reality or significance.[18] We do not believe that the Constitution should be scuttled in the interest of apparent expediency.

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[18]Mr. Justice Douglas' statement (concluding his dissenting memorandum) in a somewhat different connection in *New York v. United States* (1951), 342 US 882, 884, 96 L ed 662, 663, 72 S Ct 152 is nevertheless apropos: "Unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty."

Even assuming that to follow sound constitutional principles would present difficulties of administration, this would constitute a challenge to improve procedures, rather than a basis for denying to the public the protection intended by the Constitution. As a matter of fact, however, the administration of regulatory public utility statutes throughout most of the states and by the federal commissions has not bogged down from any practical difficulties in giving ear to the utility customers as well as to the utility corporations. Representative concepts have been successfully utilized: indeed, municipal representatives have become the principal spokesmen for the customer interests.[19]

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[19]The published opinions of the California Railroad Commission, now called the California Public Utilities Commission, the published opinions of other state regulatory commissions and the records and decisions of the Federal Power Commission show continuing representation of customer interests by cities throughout the United States, in response to extensive notice of pending proceedings and of scheduled hearings.

Moreover, momentous decisions have arisen from actions by municipalities or other public spokesmen, testing the lawfulness of commission decisions, e.g., *Phillips Petroleum Co. v. Wisconsin* (1954), 347 US 672, 98 L ed 1035, 74 S Ct 794, affirming the decision in *State of Wisconsin v. Federal Power Commission*, 205 F 2d 706, where City of Detroit, City of Kansas City and City of Milwaukee were intervenors. Cf. *City of Yonkers v. United States* (1944), 320 US 685, 88 L ed 400, 64 S Ct 327, and *New York v. United States* (1947), 331 US 284, 91 L ed 1492, 67 S Ct 1207. See also *City of Detroit v. Federal Power Commission* (1955), 230 F 2d 810; *City of Hastings v. Federal Power Commission* (1954), 221 F 2d 31; *City of Detroit v. Michigan Public Service Comm.*, 14 NW 2d 784, and *State ex rel City of Sedalia v. Public Utilities Comm.* (Mo. 1918), 204 SW 497.

If this appeal were to be dismissed, and if municipal lawyers were thus to be brought to understand that they assert customer interests by the mere grace of a Commission or of a special statute, it is unlikely that this pattern of effective representation will persist throughout the nation.

Against such a consequence, the federal questions presented are obviously substantial.

3. The effect of the judgment below, that the Commission has the power finally to increase a public utility corporation's charges to its customers by considering the corporation's application and evidence alone, is in direct conflict with this Court's decision in *Wichita Railroad & Light Co. v. Public Utilities Commission* (1922), 260 US

Although Los Angeles, San Francisco, San Diego, Oakland, Long Beach and many other California cities have appeared in utility rate proceedings, over several decades, as spokesmen for utility customers in their areas, no previous instance is known of an assertion by the Commission that these cities or other customers appeared as a matter of grace, and not as a matter of right. Among rate proceedings before the Commission where Los Angeles so appeared were those reported in 53 Cal. PUC 275, 51 Cal. PUC 419, 50 Cal. PUC 247 (where the Commission granted Los Angeles' motion to dismiss an application by The Pacific Telephone and Telegraph Company for rate increases of more than $35,000,000 annually), 48 Cal. PUC 823 and 48 Cal. PUC 1. Indeed, the City of Los Angeles has for many years been an active participant in major utility rate proceedings before the California Commission, where utility charges to it or its residents were in issue. Moreover, the City of Los Angeles has appeared *as a party*, on the Commission's side, to support its orders in rate proceedings before the California Supreme Court as, e.g., in *Southern Counties Gas Company v. Public Utilities Commission*, S.F. No. 18608 (writ denied without opinion July 31, 1952), and in *The Pacific Telephone and Telegraph Company v. Public Utilities Commission* (1950), 34 Cal. 2d 822.

48, 67 L ed 124, 43 S Ct 51, and conflicts in principle with this Court's decisions in many other cases, including *In Re Oliver* (1948), 333 US 257, 92 L ed 682, 68 S Ct 499; *Railroad Commission v. Pacific Gas & Electric Co.* (1938), 302 US 388, 82 L ed 319, 58 S Ct 334; *Ohio Bell Telephone Company v. Public Utilities Commission* (1937), 301 US 292, 81 L ed 1093, 57 S Ct 724; *Morgan v. United States* (1936), 298 US 468, 80 L ed 1288, 56 S Ct. 906; *St. Joseph Stockyard Company v. United States* (1936), 298 US 38, 80 L ed 1033, 56 S Ct 720; *Panama Refining Company v. Ryan* (1935), 293 US 388, 79 L ed 446, 55 S Ct 241; *Southern Railway Company v. Virginia* (1933), 290 US 190, 78 L ed 260, 54 S Ct 148; *Hollis v. Kutz* (1921), 255 US 452, 65 L ed 727, 41 S Ct 371; *Interstate Commerce Commission v. Louisville & Nashville R. Co.* (1913), 227 US 88, 57 L ed 431, 33 S Ct 185; *Smyth v. Ames* (1897), 169 US 466, 42 L ed 819, 18 S Ct 418, and *Covington & L. Turnpike Road Co. v. Sandford* (1896), 164 US 578, 41 L ed 560, 17 S Ct 198.

Conclusion.

The Commission's Decision No. 55936 violates the appellants' rights under the Fourteenth Amendment and is therefore void. Consequently, that decision should have been struck down by the California Supreme Court.

It is respectfully submitted that this Court manifestly has jurisdiction to correct such error below, and that the question presented is substantial.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,

ALAN G. CAMPBELL,
Assistant City Attorney,
Attorneys for the Appellant,
The City of Los Angeles.

ROGER ARNEBERGH,
Appellant in Propria Persona,
400 City Hall,
Los Angeles 12, California.

WALHFRED JACOBSON,
City Attorney,
Attorney for the Appellant,
The City of Long Beach.

WALHFRED JACOBSON,
Appellant in Propria Persona,
600 City Hall,
Long Beach 2, California.

Of Counsel:

LESLIE E. STILL,
Deputy City Attorney,
City of Long Beach,
600 City Hall,
Long Beach 2, California.

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ROGER ARNEBERGH,
City Attorney,

ALAN G. CAMPBELL,
Assistant City Attorney,
Attorneys for the Appellant,
The City of Los Angeles.

ROGER ARNEBERGH,
Appellant in Propria Persona,
400 City Hall,
Los Angeles 12, California.

WALHFRED JACOBSON,
City Attorney,
Attorney for the Appellant,
The City of Long Beach.

WALHFRED JACOBSON,
Appellant in Propria Persona,
600 City Hall,
Long Beach 2, California.

Of Counsel:

LESLIE E. STILL,
Deputy City Attorney,
City of Long Beach,
600 City Hall,
Long Beach 2, California.

APPENDIX B.

Decision No. 55936.

Application No. 39309.

Before the Public Utilities Commission of the State of California.

In the Matter of the Application of The Pacific Telephone and Telegraph Company, a corporation, for authority to increase certain intrastate rates and charges applicable to telephone service furnished within the State of California.

California Water & Telephone Company, a corporation, Complainant, vs. The Pacific Telephone and Telegraph Company, a corporation, Defendant. Case No. 5974.

The Pacific Telephone and Telegraph Company, a corporation, Complainant, vs. General Telephone Company of California, a corporation, California Water & Telephone Company, a corporation, and Sunland-Tujunga Telephone Company, a corporation, Defendants. Case No. 5983.

Appearances are listed in Attachment 1 hereto.

Interim Opinion.

Nature of Proceedings.

By the above-entitled application filed August 7, 1957, The Pacific Telephone and Telegraph Company[1] seeks an order of this Commission authorizing increases in certain intrastate telephone rates and charges sufficient to produce increased revenues of $28,500,000 annually.

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[1]Hereinafter sometimes referred to as Pacific.

Case No. 5974 is a complaint filed by California Water & Telephone Company[2] on August 29, 1957, seeking an order of this Commission directing The Pacific Telephone and Telegraph Company to enter into a particular agreement with California for a division of revenues derived from message toll and multiple message unit traffic interchanged between their respective telephone systems. In its answer, filed September 16, 1957, Pacific stated its refusal to enter into the agreement proposed by California. In substance, Pacific's answer also stated that the remedy for deficient toll compensation lay in the hands of California to negotiate with Pacific and proposed that an agreement covering multi-message unit traffic for the Los Angeles Extended Area be entered into by the four telephone utilities handling multi-message unit traffic in such area.

Case No. 5983 is a complaint filed by The Pacific Telephone and Telegraph Company on September 16, 1957, seeking an order of this Commission directing General Telephone Company of California,[3] California Water & Telephone Company, and Sunland-Tujunga Telephone Company,[4] to enter into an agreement with Pacific for a division of revenues from multi-message unit traffic interchanged between any of the four utilities in the Los Angeles Extended Area. The agreement proposed by Pacific in this case is identical with that which it proposed in Case No. 5974. California's answer, filed September 17, 1957, in substance stated that the issues in this case were those raised by Case No. 5974 and that there is

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[2]Hereinafter sometimes referred to as California.

[3]Hereinafter sometimes referred to as General.

[4]Hereinafter sometimes referred to as Sunland.

no valid reason why all settlement arrangements between California and Pacific may not be determined independently of settlement arrangements between Pacific and any other telephone companies. General's answer, filed September 20, 1957, in substance alleges that Pacific's proposed agreement, under existing rates, is unfair and unreasonable and, under any circumstances, is unworkable. Sunland's answer, filed September 24, 1957, in substance alleges that Pacific's proposed agreement is unfair and unworkable. The answer of both General and Sunland ask that this Commission take jurisdiction over the present disagreements of the parties and establish settlement methods for multi-message unit or ticketed traffic business interchanged between the parties.

Public Hearings and Present Status of Proceedings.

The two complaint cases were consolidated and public hearings thereon held before Commissioner Rex Hardy and Examiner Manley W. Edwards on September 19 and 20, 1957, at Los Angeles, and before Commissioner Hardy on September 26, 1957, at San Francisco.

After due notice, public hearings in the matter of Pacific's application for increased telephone rates were held before Commissioner Matthew J. Dooley and Examiner F. Everett Emerson on September 25, 26 and 27, 1957, at San Francisco. Because of the fact that Pacific's application respecting rates includes a rate proposal pertaining to multi message unit traffic for the Los Angeles Extended Area, as well as for one other extended area in the state, and because of the intimate relationship of the two complaint cases thereto, the Commission reassigned the complaint matters to Commissioner Dooley and Exa er Emerson. All three matters were then consoli-

dated during the hearing on September 27 and the public hearings thereon continued on September 27 and on October 3, 4 and 10, at San Francisco and October 17, 1957, at Los Angeles.

None of the matters are concluded at this point. In the application matter, Pacific has not as yet completed its full showing, cross-examination is to be undertaken, the affirmative presentations of other parties are yet to be heard, and nine additional days of hearing in such matter are now on the Commission's calendar. The complaint cases have been temporarily removed from the calendar but neither case has been finally submitted for decision.

Issues Considered Herein.

At the hearing on September 27, the four companies furnishing service in the Los Angeles Extended Area (within their respective serving areas and jointly, through the interchange of traffic) joined in placing a "motion for interim relief" before the Commission. Such motion, in effect, seeks authorization (1) to reduce the length of mileage steps for extended service, and (2) to increase the multi-message unit rate from 4.25 to 4.3 cents in the Los Angeles Extended Area.

The four companies seek to effectuate such proposal by mutually entering into an agreement, dated September 23, 1957, covering, basically, the division between them of revenues derived from interchanged traffic. The agreement is a conditional one, in three respects. First, the agreement states that it is subject to the approval of this Commission. Second, the agreement would become effective "if and when" each of the four companies is permitted to make the proposed reduction in length of mile-

age steps. Third, the agreement would become effective "if and when," coincident with the change in mileage steps, each of the four companies is permitted to charge message unit rates no less than 4.3 cents per message unit.

The motion for interim relief and the proposed agreement between the four companies are the only issues to be considered and disposed of in this decision. All other matters involved in the three proceedings will be held in abeyance pending final submission of the matters.

Nature of Evidence.

The four companies have been dividing revenues from interchanged traffic in accordance with an agreement between them approved by this Commission in 1954.[5] Among other things, the Commission at that time authorized the rate per message unit presently in effect. The present tariff schedules for multi-message unit service vary between companies. Pacific and General have complete schedules setting forth both the rate and the mileage steps. Sunland's schedule refers to the tariffs of connecting companies, both as to steps and rate. California's filed schedule sets forth the rate and refers to connecting company tariffs as to the mileage steps.

As of June 21, 1957, the prior agreement respecting division of revenues was cancelled by the parties and there is no presently effective agreement covering the division of revenues arising from the interchange of multi-message unit traffic in the Los Angeles Extended Area. While the companies, accounting-wise, seem to be assuming that, pending decision in this matter, settlements

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[5]Agreement dated December 14, 1953, approved by Decision No. 50260 in Case No. 5462, issued July 6, 1954 (53 CPUC 342).

between them will be continued on the basis of the prior agreement, no settlements are in fact being made. Settlements for the interim period between agreements can be no more than conjectural at this time.

The proposed new agreement provides that each company shall receive, out of the revenues arising from interchanged traffic, an amount equal to its expenses in furnishing the service which generates such revenues and that the remainder of the revenues will be divided among the four companies in proportion to the net investment in plant which each company devotes to the interchanged multi-message unit traffic.

Following the methods covered in the prior agreement, except for the use of year-end instead of average net investment, the four companies have recently completed a study of revenues, expenses and net investment based on presently effective rates. The results of such study[6] indicate the following:

LAEA Interchanged MMU Operations
Year 1956—Present Rates

Item	Company				
	California	General	Pacific	Sunland	Total
Settlement					
Revenues	$ 2,326,000	$12,089,000	$16,474,000	$ 247,000	$31,136,000
Expenses	1,956,000	10,655,000	15,239,000	212,000	28,062,000
Balance	$ 370,000	$ 1,434,000	$ 1,235,000	$ 35,000	$ 3,074,000
Net Investment*	$10,726,000	$41,562,000	$35,799,000	$1,008,000	$89,095,000
Settlement Ratio[7]	3.45%	3.45%	3.45%	3.45%	3.45%

*End of year.

[6]Exhibit No. 35.

[7]The *uniformity* of settlement ratios here shown arises from the prior agreement approved in Decision No. 50260 in Case No. 5462.

This study, when adjusted to reflect the mileage-step and rate changes proposed, indicates the following results:[8]

LAEA Interchanged MMU Operations
Year 1956—Proposed Rates and Steps

Item	Company				
	California	General	Pacific	Sunland	Total
Settlement Revenues	$ 3,203,000	$15,506,000	$19,434,000	$ 329,000	$38,472,000
Expenses	2,429,000	12,508,000	16,852,000	256,000	32,045,000
Balance	$ 774,000	$ 2,998,000	$ 2,582,000	$ 73,000	$ 6,427,000
Net Investment*	$10,726,000	$41,562,000	$35,799,000	$1,008,000	$89,095,000
Settlement Ratio[7]	7.21%	7.21%	7.21%	7.21%	7.21%

*End of year.

The showing of the four companies included exhibits and testimony respecting over-all estimated operations for the year 1957 (California intrastate for Pacific and total company for the other three), which may best be summarized by the following tabulation showing results of operations. In each instance, the respective presentations were in support of allegations that the rates of return to be realized during 1957 will be below a fair and reasonable level. Of the four companies, all but Sunland has a rate increase application on file with this Commission.

Results of Operations—Present Rates
Estimated Year 1957

Item	Company			
	California[a]	General[b]	Pacific[c]	Sunland[d]
Operating Revenues	$12,426,072	$ 80,724,000	$ 573,205,000	$ 994,838
Operating Expenses	10,174,928	65,595,000	494,604,000	788,854
Net Revenue	$ 2,251,144	$ 15,129,000	$ 78,601,000	$ 205,984
Net Plant and Working Capital	$43,179,843	$257,040,000	$1,316,902,000	$3,630,000
Per Cent Return	5.21%	5.89%	5.97%	5.67%

[a]Exhibit No. 48.
[b]Exhibit No. 45.
[c]Exhibit No. 13, Table 3.
[d]Exhibit No. 37.

[8]Table 3 of Exhibit No. 35.

As further evidence of the need for increased revenues, California's witness testified that California had a 1957 construction requirement which called for the financing of approximately $16,000,000. In view of anticipated earnings, however, California directors felt that the most that might be raised during 1957 was $13,000,000. California's rate proceeding, it was hoped, would permit of such financing. The witness further stated that, because of delay in receiving rate relief through that proceeding, California's directors have had to cut $3,000,000 from the proposed 1957 financing. Such cutback, according to the witness, has very seriously affected its construction program. Immediate rate relief is imperative if California is to be able to sell its securities at a reasonable price and obtain the funds necessary to complete its 1957 financing, lay a foundation for 1958 financing and to carry out even its presently curtailed construction program, according to the witness.

The testimony of Sunland's witness indicates that Sunland has been and now is faced with substantial plant expansion. In the two-year period ended June 30, 1957, plant investment represented a growth of approximately $1,100,000 or about 40 per cent. For the succeeding year, 1958, construction requirements are about $476,000 additionally. The witness testified that Sunland's current and projected earnings, at the level of present rates, will be insufficient to support financing of the needed construction for which it hopes to sell $366,000 worth of common stock. The construction program hinges upon whether or not immediate rate relief is granted, according to this witness.

Position of Various Parties.

In addition to cross-examining witnesses, various parties made statements of position and presented argument respecting both the merits of the matter and its procedural aspects. These are briefly summarized as follows:

The *City and County of San Francisco* considers that the proposed rate change is long overdue and that the rate for message unit service should be the same throughout the state, as are the rates for toll message service. Specifically, it is urged that the mileage steps and the message unit rate be identical in Los Angeles and San Francisco.

The *City of Los Angeles* urges denial of the motion for interim relief on several grounds. Primarily, this city maintains that procedurally the matters are wholly deficient and that the application and the two cases here under consideration do not provide a proper "vehicle" for determination of the issues. Further, it is maintained that no adequate showing of emergency need has been made, with the possible exception of only one of the companies, and that in the absence of a full showing of urgency the granting of interim relief is unwarranted. If, however, interim rate relief at this time is granted by the Commission, it is urged that the Commission offset the additional message unit revenue which Pacific might receive by appropriate reductions in other basic rates.

The *California Farm Bureau Federation* points out that the revenues derived from a metropolitan area have a direct bearing on the total system-wide service rendered by a utility. If the utilities were to obtain sufficient revenues, farm bureau members might then be able to obtain the particular telephone services desired by them.

A showing that the proposed rates would provide the revenue which the four companies need for their total system operations would be sufficient for the farm bureau to support the proposal. While the farm bureau feels that in the interest of system-wide service the multi-message unit rate proposals here before the Commission are in the public interest, it is urged that if it should develop that any one or all of the four companies would have a higher than reasonable rate of return, the Commission would order lower rates into effect without disturbing the uniformity of the multi-message unit rate structure.

The *City of Long Beach* in written as well as oral argument opposes the granting of the relief sought on two basic grounds. First, it is contended that this Commission lacks jurisdiction to entertain the motion for interim relief insofar as the companies other than Pacific is concerned, or, in other words, the present proceedings do not provide a proper "vehicle" for determination of the issues. Second, it is maintained that none of the companies has sustained the burden of proof that there now exists an emergency financial condition that warrants the granting of interim relief to any of them. It is urged, however, that if such relief is granted for multi-message unit service, exchange services should be simultaneously adjusted downward by an equivalent offsetting amount.

The *Commission Staff* maintains that there is nothing in the statutes or in the Commission's general orders which requires approval of the agreement between the companies as to the division of revenues among them; nor is it essential, in the opinion of staff counsel, that

all four companies have a uniform rate of return on the multi-message unit portion of their business. The staff maintains that an applicant for interim relief must fully carry the burden of showing urgent need, and staff counsel urged that, of the four companies, only California had made any such showing. While uniform multi-message unit rate treatment is desirable in the Los Angeles Extended Area, a uniform rate is not necessarily essential, according to the staff.

Findings and Conclusions.

The Commission finds that procedurally and jurisdictionally the matters treated herein are properly before it and, among others, specifically relies upon the provisions of Sections 701 and 766 of the Public Utilities Code to such effect. In view of the evidence, we find that disposition of the matters now before us by motion for interim relief is both necessary and convenient in the exercise of the Commission's duties and is in the public interest.

With respect to the various motions thus far placed before the Commission during these proceedings, all such motions inconsistent with the findings and conclusions herein made or with the following order are hereby each and severally denied.

The Commission is of the opinion and finds that the interchanged multi-message unit operations of the four companies in the Los Angeles Extended Area are now being conducted at revenue levels which produce returns below those which are fair and reasonable for such services. All four companies have need for and are entitled to increased revenues from such operations and we find the fact so to be. We further find the facts to be that

uniformity of mileage steps and multi-message unit rate in the Los Angeles Extended Area is to the best public interest and that this element of telephone operations should be self-sustaining and, insofar as possible, carry its full and equitable share of the burden of providing revenues. At this point in the proceedings, however, we shall not authorize the full increases sought.

In our opinion the characteristics of multi-message unit service are generally of the same nature as the characteristics of short haul toll service and particularly so as respects mileage steps. Mileage steps for short haul toll schedules were shortened in 1954.[9] We see no reason why mileage steps for multi-message unit service should not be identical with short haul toll mileage steps, and we find that it is now appropriate and reasonable that such be accomplished in the Los Angeles Extended Area. The record does not establish that it is necessary or desirable to increase the present multi-message unit rate of 4.25 cents in the Los Angeles Extended Area on an interim basis. Accordingly, proposed changes in mileage steps will be authorized but the proposed rate change will not. The effect of such authorization, as calculated by the companies, will be as follows:

Mileage Change Only	Increases in Charges to Customers	Increase in Settlement	Increase in Revenues to Company before Uncollectibles
California	$ 790,000	$ 278,000	$ 1,068,000
General	3,125,000	(1,036,000)	2,089,000
Pacific	11,288,000	778,000	12,066,000
Sunland	68,000	(20,000)	48,000
Total	$15,271,000	$ —	$15,271,000
	(Decrease)		

[9]Decision No. 50258 in Application No. 33935, issued July 6, 1954 (53 CPUC 275).

The total increase of $15,271,000 to be authorized is $987,000 less than that sought by the four companies. As compared with the 7.21 per cent settlement ratio sought by the companies, the authorized increases are based upon a 6.98 per cent settlement ratio for interchanged business. However, on total multi-message unit operations, the resulting total ratios will be as follows:[10]

California	—	6.98%
General	—	6.98%
Pacific	—	5.53%
Sunland	—	6.98%
Total Companies' Operation	—	6.00%

The proposed agreement between the four companies should not be approved for the basic reason that the agreement provides that it shall become effective "if and when" each of the four companies is permitted to change mileage steps and to charge no lesser rate than 4.3 cents per message unit. We find these provisions to be unreasonable and improper. The agreement, in its present form, will not be approved. We further find, as hereinabove stated, that it is in the public interest that multi-message unit business, insofar as possible, should be self-supporting and that the rate structure therefor should be maintained at such level as will assure that all reasonable costs of providing the service will be met, plus a fair and reasonable return to each company on the investment devoted by it to such business.

We find that the increased charges which will result from the changed lengths of mileage steps in the Los Angeles Extended Area herein authorized are justified

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[10]From Exhibit No. 46, Table 4.

and that insofar as existing charges in said Area differ therefrom, such charges are for the future unjust and unreasonable.

We find it to be fair and reasonable that Pacific should be the tariff filing utility for Los Angeles Extended Area interchanged multi-message unit traffic and that it is appropriate that the other utilities' tariffs reflect the same by suitable references in the respective schedules. The order herein will implement such desirable tariff-filing situation.

The parties are hereby placed on notice that this is an interim decision and that the Commission retains jurisdiction to modify the same in the final decision which it will render herein should the facts and experience hereunder warrant.

INTERIM ORDER.

The matters herein being properly before the Commission, public hearing thereon having been held and evidence adduced thereat, the Commission having been informed with respect thereto and the matter of interim relief having been submitted, the matters are now ready for decision based upon the evidence and the findings and conclusions contained in the foregoing opinion; therefore,

IT IS HEREBY ORDERED as follows:

1. The Pacific Telephone and Telegraph Company is authorized and directed to file in quadruplicate with this Commission after the effective date of this order, in conformity with the Commission's General Order No. 96,

revised tariff schedules with changes in rates, charges and conditions as set forth in Appendix A attached hereto, and, after not less than five days' notice to this Commission and to the public, to make said revised tariff schedules effective for service furnished on and after January 6, 1958.

2. The General Telephone Company of California is authorized and directed to file in quadruplicate with this Commission after the effective date of this order, in conformity with the Commission's General Order No. 96, revised tariff schedules with changes in rates, charges and conditions as set forth in Appendix B attached hereto, and, after not less than five days' notice to this Commission and to the public, to make said revised tariff schedules effective for service furnished on and after January 6, 1958.

3. California Water & Telephone Company is authorized and directed to file in quadruplicate with this Commission after the effective date of this order, in conformity with the Commission's General Order No. 96, revised tariff schedules with changes in rates, charges and conditions as set forth in Appendix C attached hereto, and, after not less than five days' notice to this Commission and to the public, to make said revised tariff schedules effective for service furnished on and after January 6, 1958.

4. Public hearings in Application No. 39309, Case No. 5974 and Case No. 5983 are continued to such dates,

times and places as may from time to time appear on the Commission's hearing calendar.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 10th day of December, 1957.

Peter E. Mitchell
President

Ray E. Untereiner

Matthew J. Dooley

Rex Hardy

C. Lyn Fox
Commissioners

ATTACHMENT 1

List of Appearances

PRINCIPALS:

Pillsbury, Madison & Sutro, by *Francis N. Marshall* and *Arthur T. George,* for The Pacific Telephone and Telegraph Company, applicant and defendant;

Bacigalupi, Elkus & Salinger, by *Claude N. Rosenberg* and *William Fleckles* for California Water & Telephone Company, interested party, complainant and defendant;

John Robert Jones and *Albert M. Hart,* for General Telephone Company of California, interested party and defendant;

Orrick, Dahlquist, Herrington & Sutcliffe, by *Warren A. Palmer,* and *Alan R. Stacey,* for Sunland-Tujunga Telephone Company, interested party and defendant;

PROTESTANTS:

Telephone Answering System of California, Inc., by *Bert Levy, L. E. Langlois* and *George W. Smith;* Telephone Answering Services of California, Inc., by *Lew Lauria;* City of San Pablo, by *Leland F. Reeves; Carl J. Ellis* in propria persona; Bert Levy in propria persona.

INTERESTED PARTIES:

California Farm Bureau Federation, by *J. J. Deuel, Joseph O. Joynt* and *Bert Buzzini;* City and County of San Francisco, by *Dion R. Holm* and *Paul L. Beck;* City of Los Angeles, by *Roger Arnebergh, Alan G. Campbell, T. M. Chubb* and *Robert W. Russell;* City of Berkeley,

by Fred C. Hutchinson and *Robert T. Anderson;* City of Long Beach, by Walhfred Jacobson, *Leslie E. Still* and *Henry E. Jordan;* City of Oakland, by John W. Collier and *Edward A. Goggins;* City of Richmond, by *Sherrill D. Luke;* City of Sacramento; by *Everett M. Glenn;* City of Sunnyvale, by *Robert P. Berkman;* City of Seaside, by Saul M. Weingarten; City of San Diego, by *Frederick B. Holoboff* and *Aaron W. Reese;* California Independent Telephone Association, by *Neal C. Hasbrook;* Sunkist Growers, Inc., and Exchange Orange Products Company, by *W. D. McKay;* Western California Telephone Company, by Harold O. Davis; E. A. Hosmer & Co., by E. A. Hosmer; San Joaquin County Board of Supervisors, by C. P. Kenyon; International Brotherhood of Electrical Workers, by *O. A. Rieman;* California Nevada Conference of National Electrical Contractors Association, by *W. J. Varley;* City of Pasadena, by *Frank L. Kostlan;* City of Lakewood, by *Carl J. Ellis.*

COMMISSION STAFF:

Mary Moran Pajalich, M. J. Kimball and *John F. Donovan.*

APPENDIX A

RATES

The presently effective rates, charges and conditions of The Pacific Telephone and Telegraph Company are changed as set forth in this appendix.

Schedule No. 6-T

Message Unit Service—Los Angeles Extended Area

Rates (3)(b), Number of Message Units per Initial and Additional Periods:

Where the Air-Line Toll Rate Mileage Between Toll Rate Centers Is[a]		The Number of Message Unit per Initial Period Is	The Initial Period Is	The Number of Units per Additional Period Is	The Additional Period Is
Over	Including				
0 —	8	2 message units	3 minutes	1 message unit	2 minutes
8 —	12	3 message units	3 minutes	1 message unit	1 minute
12 —	16	4 message units	3 minutes	1 message unit	1 minute
16 —	20	5 message units	3 minutes	1 message unit	1 minute
20 —	25	6 message units	3 minutes	2 message units	1 minute
25 —	30	7 message units	3 minutes	2 message units	1 minute
30 —	35	8 message units	3 minutes	2 message units	1 minute
35 —	40	9 message units	3 minutes	3 message units	1 minute
40 —	50	10 message units	3 minutes	3 message units	1 minute
50 —	60	11 message units	3 minutes	3 message units	1 minute

[a]Outside the local service area.

Rates (3)(c), Number of Message Units per Initial Period:

Revise rate to conform with authorized Rates (3)(b) above.

Appendix B

Rates

The presently effective rates, charges, and conditions of the General Telephone Company of California are changed as set forth in this appendix.

Schedule No. H-1
Message Unit Service

Applicability

Applicable in connection with extended service and Los Angeles foreign exchange service.

Territory

Within the exchange areas of the Covina, Downey, Long Beach, Malibu, Redondo, Santa Monica, West Los Angeles and Whittier exchanges as said areas are defined on maps filed as part of the tariff schedules.

Rates — *Rate per Month*

(1) Flat Rates and Message Rates:
Primary and extension stations — As set forth in Extended Service Schedules.

(2) Message Unit Rate:

(a) All routes except between Malibu and West Los Angeles Exchanges:

The message unit rate is in accordance with the message unit service tariff provisions of the connecting company.

(b) Between Malibu and West Los Angeles Exchange:

	Rate per Unit
1. Semi-public, public telephone, foreign exchange and hotel P.B.X. service	$0.05
2. Other services	.0425

(3) Number of Message Units:

(a) All routes except between Malibu and West Los Angeles Exchanges

The number of message units applicable to a message is in accordance with the message unit service tariff provisions of the connecting company.

(b) Between Malibu and West Los Angeles Exchanges:

Route		The Number of Message Units per Initial Period Is	The Initial Period Is	The Number of Units per Overtime Period Is	The Overtime Period Is
Between	And				
Malibu D.A.	West Los Angeles	2 message Units	3 minutes	1 Message Unit	2 minutes
Zuma D.A.	West Los Angeles	4 message Units	3 minutes	1 Message Unit	1 minute

D.A.—District Area

Special Condition:

Appendix C

Rates

The presently effective rates, charges, and conditions of the California Water & Telephone Company are changed as set forth in this appendix.

Schedule No. H-1

Message Unit Service

Applicability

Applicable in connection with business individual, two-party and suburban line, residence individual, two-party, four-party and suburban line, commercial and hotel private branch exchange, business and residence key system, semi-public and public telephone, and Los Angeles and extended foreign exchange services.

Territory

Within the following listed exchange areas, as said areas are defined on maps filed as part of the tariff schedules:

Monrovia San Fernando Sierre Madre

Rates, Rules and Conditions

Rates, rules and conditions for Message Unit Service from Monrovia, San Fernando, and Sierre Madre exchanges to other exchanges and district areas of the Los Angeles Extended Area are in accordance with the rates, rules and conditions applicable to Message Unit Service contained in tariff schedules of the connecting company.

APPENDIX C.

BEFORE THE

Public Utilities Commission of the State of California

Application No. 39309

In the Matter of the Application of THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY a corporation, for authority to increase certain intrastate rates and charges applicable to telephone service furnished within the State of California.

Case No. 5974

CALIFORNIA WATER & TELEPHONE COMPANY, a corporation,
Complainant,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Defendant.

Case No. 5983

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Complainant,

vs.

GENERAL TELEPHONE COMPANY OF CALIFORNIA, a corporation, CALIFORNIA WATER & TELEPHONE COMPANY, a corporation, and SUNLAND-TUJUNGA TELEPHONE COMPANY, a corporation,
Defendants.

Petition for Rehearing, Following the Commission's Decision No. 55936, of the Matters Comprehended by That Decision.

To the Honorable, the Public Utilities Commission of the State of California:

The City of Los Angeles, a municipal corporation, and Roger Arnebergh, as a subscriber of The Pacific Telephone and Telegraph Company, interested parties herein, respectfully petition:

I. That a rehearing be granted herein for the purpose of reconsidering the matters comprehended by the

Commission's Decision No. 55936, and for the purpose, upon such rehearing and reconsideration, of setting such decision wholly aside; and

II. That a rehearing be granted herein and that coincidentally with such grant of a rehearing the Commission vacate and set wholly aside its Decision No. 55936.

This petition is made upon the grounds here shortly stated, and upon the grounds hereafter more fully set forth:

(1) This Commission was and is without jurisdiction, power or authority to grant or authorize increases in subscribers' telephone rates as provided by Decision No. 55936, or to grant or authorize any other increases in subscribers' telephone rates, without completing a full hearing and investigation of the affairs and operations of the telephone companies involved.

(2) It has not been made to appear to the Commission that The Pacific Telephone and Telegraph Company ("Pacific") is in a precarious financial condition, or that any emergency requires that its revenues or earnings be increased by an interim order before the completion of a full hearing and investigation into Pacific's affairs. On the contrary, Exhibit 31, Chapter 4, Table B, shows that as of December 31, 1956, the company had an unappropriated earned surplus of $87,387,322.40. The record further shows that present earnings under existing rates are more than adequate to meet all expenses, including payment of dividends to stockholders at current rates, and, in addition, add substantially to such surpluses.

(3) Similarly, it has not been made to appear to the Commission that General Telephone Company of California ("General"), California Water & Telephone Company ("California") or Sunland-Tujunga Telephone

Company ("Sunland"), is in a precarious financial condition or that any other emergency requires that its revenues or earnings be increased by an interim order, without the completion of a full hearing and investigation by the Commission of its affairs.

Consequently, this Commission was and is without jurisdiction, power or authority to make the findings or orders with respect to those telephone corporations which are provided by its Decision No. 55936, by interim order.

(4) Until the Commission has held a full hearing, and after such hearing has found that the rates charged are insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential, the Commission is without jurisdiction, power, or authority to determine and fix, by order, the just, reasonable, or sufficient rate, and such hearing must include:

(a) a full and complete presentation of evidence by the company or companies applying for such increase, which evidence, if not controverted, disproved, or discredited, would require an increase in rates;

(b) a full opportunity to the public, representatives of municipalities and other interested parties to cross-examine applicant's witnesses;

(c) an opportunity for the presentation of testimony and other evidence by the public, by representatives of municipalities, and other interested parties. Further, established practice has set the precedent of having a presentation made by the Commission's own staff, and it would be an abuse of discretion for the Commission to grant an increase in rates without first providing for a presentation of evidence by such staff, which is supported and paid for by the public for such purpose, among others.

(5) The Commission is without jurisdiction, power or authority to make the findings or orders provided by its Decision No. 55936, by interim order.

(6) The increases in rates to telephone subscribers authorized by Decision No. 55936 are applicable solely in the Los Angeles extended area. There was received in evidence in this consolidated proceeding Exhibit No. 63. Attached hereto, marked Exhibit "A", and by such reference made a part hereof, is a copy of Table 2 of such Exhibit 63. From evidence offered to the Commission by Pacific before the rendition of such decision on December 10, 1957, it appeared that in the first six months of 1957:

(a) under present rates Pacific earned no less than 5.92% from its total intrastate operations;

(b) although Pacific seeks rate increases to increase its total intrastate revenues by nearly $40,000,000 in order that its earnings therefrom will be at the rate of 6.91%. its earnings from its exchange operations within the Los Angeles extended area under present rates now exceed this rate of 6.91%.

(c) Based on Pacific's actual operations during the first six months of 1957 its additional revenues solely from the increased rates authorized in the Los Angeles extended area would enable it to increase its earnings from total intrastate operations to 6.33%, by increases in its earnings from its exchange operations in the Los Angeles extended area from a minimum of 7.01% to at least 8.23%.

The imposition upon the telephone subscribers in the Los Angeles extended area of such an unwarranted and unjustified burden is unreasonable, inequitable, discriminatory and unfair and on such account the Commission

was and is without jurisdiction, power or authority to make the orders provided by Decision No. 55936, and such decision is unlawful.

Bases of Petition.

This petition is based upon all of the files and records in the three above-entitled and numbered proceedings; upon all of the files and records in the proceeding upon the application, No. A-38685, of California Water & Telephone Company for an increase in its rates; upon all of the files and records in the proceeding upon the application, No. A-39465, of General Telephone Company of California for an increase in its rates; upon the transcript of all of the hearings had in those two latter proceedings and in the three above-entitled and numbered proceedings; upon all of the exhibits identified in each of those five proceedings; and upon the Commission's Decision No. 55936.

Additionally, this petition is based upon the Commission's General Orders; upon the Commission's Rules of Procedure; and upon the Commission's prior practices and decisions in connection with motions for increased utility rates by interim order. Finally, this petition is based upon the 14th Amendment to the Constitution of the United States; upon the Constitution of the State of California; and upon the statutes made and provided by the Legislature of the State of California.

Grounds of Petition.

As a more extensive statement of the grounds of this petition it is respectfully shown as follows:

(1) By Decision No. 55936 the Commission granted and authorized increases in the rates charged to telephone subscribers for extended area telephone calls by Pacific,

General, California and Sunland. Such increases in rates were effected by the Commission's authorization to those companies to decrease the mileage steps which provide the basis for multi-message unit charges for extended area telephone calls between subscribers within the Los Angeles extended area. Such decision was issued by the Commission in the above-named three proceedings, consolidated for hearing before the Commission.

Decision No. 55936 constitutes the Commission's determination of a motion made by those four telephone corporations in such consolidated proceeding.

There were presented to the Commission in that consolidated proceeding issues as to the proper level of the earnings and rates of Pacific throughout the State of California, but there were *not* before the Commission in that consolidated proceeding any issues or evidence as to the proper level of the earnings and rates of the other three named telephone corporations, either within the Los Angeles extended area or throughout the State of California.

At the time the said motion was made, on September 27, 1957, and to the time the said motion was submitted for decision (over the express objections of your petitioners) on October 14, 1957, there were not before the Commission, in such consolidated hearing or at all, any issues raised by any application or complaint as to the level of the earnings or rates of the Sunland-Tujunga Telephone Company.

There was then pending in the proceeding upon the application of California Water & Telephone Company, No. A-38085, issues as to the proper level of earnings and rates of that telephone corporation, but the said pro-

ceeding was not at the time before the Commission for hearing or determination.

There was then pending in the proceeding upon the application of General Telephone Company of California, No. A-39465, issues as to the proper level of the earnings and rates of that telephone corporation, but the said proceeding was not at the time before the Commission for hearing or determination, nor has there yet been any hearing in that proceeding.

Not only were there no issues as to the proper level of earnings or rates of the said three telephone corporations properly before the Commission when such motion by the four telephone companies was made, but *no notice* had been given to this petitioner or to other municipal corporations, within the Los Angeles extended area, or elsewhere in California, or to the public, that any proposal for increases in the rates of those three telephone corporations would be submitted to or considered by the Commission in connection with the said consolidated hearing on September 27, 1957.

Neither on September 27, 1957 when such motion was made, nor on October 14, 1957 when such motion was submitted, nor on December 10, 1957 when such motion was determined by Decision No. 55936, had any of the four named telephone corporations completed any showing in this consolidated proceeding of deficient earnings under its present rates, nor had the Commission staff completed or shown its investigation or evidence in such regard therein, nor had the Commission otherwise completed its own investigation, nor had cross-examination been completed, nor had there been any opportunity for the presentation to the Commission of evidence by the

public, by representatives of municipalities, or by other interested parties.

The Commission was and is without jurisdiction, power or authority to grant or authorize increases in subscribers' telephone rates as provided by Decision No. 55936, or to grant or authorize any other increases in subscribers' telephone rates, without completing a full hearing and investigation of the affairs and operations of the telephone companies involved.

(2) In the above-entitled and numbered proceedings, consolidated, it has been made to appear to the Commission, from evidence offered by The Pacific Telephone and Telegraph Company, the applicant in No. A-39309, and prior to December 10, 1957, when the Commission issued its Decision No. 55936, that:

(a) Pacific's annual dollar earnings are currently higher than they have ever been before;

(b) Pacific's annual dollar earnings are more than sufficient, after the payment of all necessary wages, salaries and other operating expenses, after the payment of all interest charges upon Pacific's bonds, notes and other obligations, after the payment of all taxes, fees and similar charges against Pacific's properties and operations, and after the payment to the United States and to the State of California of all taxes upon Pacific's profits, to provide for maximum dividends upon Pacific's preferred stock, to provide for dividends of $7.00 a year upon each share of Pacific's common stock and, in addition to add substantially to Pacific's earned surplus.

(3) Under any circumstances that could be found in the record before it, the Commission was without jurisdiction, power or authority to increase the total charges to be paid by subscribers in the Los Angeles extended area by more than $15,000,000. The rate increases purported to be authorized under Decision No. 55936, will increase Pacific's earnings from its exchange operations in the Los Angeles extended area to a rate greatly exceeding its overall rate of earnings in California. In fact, earnings from its exchange operations in the Los Angeles extended area, under the rates purportedly authorized by said interim order would be several times higher than its earnings in many other areas and localities in California. To attempt to foist upon the ratepayers of the Los Angeles extended area an interim increase, at a time when the present earnings in such area already produce an excessive rate of return—earnings so high as to make Pacific's statewide average earnings adequate to cover all expenses, pay dividends to stockholders at established rates, and add substantial amounts to unappropriated earned surplus which already is in excess of $87,000,000—is such a palpable abuse of discretion as to be clearly unreasonable and improper, and, therefore, beyond the jurisdiction, power or authority of the Commission.

ARGUMENT.

POINT I.

Constitutional Due Process and Basic Concepts of Justice and Equity Require That There Be a Complete Hearing of the Issues Involved, Upon Adequate Notice to the Public, and With a Full Opportunity to Be Heard, as a Condition Precedent to Any Substantial Increase in Telephone Rates.

Under modern conditions telephone service has become an absolute necessity to industry, to wholesale and retail consumers, to governmental and other public service operations, and to many individual residents of the community.

A telephone subscriber must deal with the telephone corporation serving his area, or be denied any telephone service whatever. He is entitled, therefore, to the service he needs at fair and reasonable charges.

Existing charges are presumed to be fair and reasonable to the serving telephone corporation until it be demonstrated and found in the manner provided by law that such rates are insufficient to enable an efficiently operated company to earn a reasonable rate of return on the investment necessarily dedicated to providing the telephone service.

An increase in charges to telephone subscribers without such a finding and determination effectively deprives them of their property without due process of law.

Due process of law, under the 14th Amendment and according to historical concepts of ordinary justice and equity, require that issues be framed in a proper proceeding; that due and adequate notice of hearings be given, that witnesses be publicly examined; that those who would

be adversely affected have a full opportunity for cross-examination; that there be an adequate opportunity to prepare and present material, competent and relevant evidence. But due process of law was not followed before the issuance of Decision No. 55936, purporting to authorize the interim increase. Consequently, if such increase is permitted to go into effect, all ratepayers in the Los Angeles extended area will be unconstitutionally deprived of property without due process of law!

The matter involved is by no means either technical or unsubstantial. The record shows that the increases authorized by the Commission amount to approximately one quarter of the present total revenues from multi-message unit services in the Los Angeles extended area. Obviously, this means that the charges to the average subscriber on such account will be increased by approximately 25%.

The City of Los Angeles proposed in the limited hearings held that there be a detailed showing of the effect of the increases proposed upon typical bills. The facts in that regard should have been fully established, but our proposal was rejected.

Even in the absence of detailed evidence however, it is clear that the Commission's decision will have a heavy impact not only upon the average residential subscriber in the Los Angeles extended area, but upon all industrial and commercial operations within the Los Angeles extended area.

One has only to consider the volumes of extended area calls passing through the switchboards of insurance companies and agencies, of department stores and other retail operations, of nearly every conceivable type of in-

dustrial and commercial activity, to appreciate the heavy cost of the authorized increases to the business community in Los Angeles. The increase would likewise be oppressive and a great hardship on the average residential subscriber, especially in view of the fact that the Los Angeles extended area embraces the area occupied by a great metropolis with social and economic unity.

In view of the fact that earnings from Pacific's exchange operations in the Los Angeles extended area are already higher than its earnings in the rest of the State any increases in Pacific's multi-message unit revenues in this area, if authorized at all, should be accompanied by correlative decreases in basic monthly station charges to subscribers in this area. The charge for telephone service should not be increased. Yet no corresponding reduction was made in the Commission's order.

Even if a full hearing had been held prior to the Commission rendering a decision authorizing a rate increase such as that authorized by the interim decision, there would still have been unlawful discrimination.

The accomplishment of such a discriminatory result without a full and adequate hearing effectively deprives the affected subscribers of their property without due process of law, by compelling them to pay excessive and exorbitant telephone rates without having a fair opportunity to be heard.

POINT II.

The Statute Which Creates and Defines the Commission's Powers With Respect to the Rates of Telephone Corporations Contemplates and Requires That a Full Hearing Be Had in Accordance With Constitutional Principles.

Despite the vigorous assertions by Los Angeles and Long Beach that the four companies' motion for an interim increase should not be even entertained, the Commission has proceeded to an affirmative decision thereon in defiance of the will of the Legislature and in disregard of the Commission's own General Orders and Rules of Procedure.

Those two cities pointed out to the Commission, not once but several times, that there was no procedural vehicle before the Commission to support the order proposed by the motion.

The Commission was reminded that the issues necessary to justify such an interim increase were not even properly before the Commission for consideration, and that *the public had no notice* of proposals before the Commission for increases in rates by General, California and Sunland.

Moreover, the public had received no notice whatever of any proposal for rate increases by interim order. The public was entitled to assume that the law would be followed and that the Commission would complete its own investigation, would receive and consider detailed reports from its own staff, and would provide an opportunity to the public to be heard, before it would increase telephone charges to the public.

The Commission's findings suggest that the Commission is of the opinion that it is empowered to raise public utility rates without any hearing at all, other than that necessary to enable the utilities to present their side of the matter. It is our opinion that if the Commission entertains such a motion, it misreads both the intent and the letter of the powers granted it by the people's elected representatives in the legislature.

The Commission points in its decision to Sections 701 and 766 of the Public Utilities Code.

By the reference to Section 701 one might suppose that the Commission considers that its powers extend to whatever it finds convenient to do. Nothing could be further from the truth.

Section 766 by its title which limits its scope, pertains to "Authority to order physical connections between telephone, etc., lines: Cost of connections." Even the limited power granted the Commission by such section expressly requires a "hearing" before the Commission may act. The section specifically requires a further hearing before the Commission can direct a division of joint revenues between telephone corporations. Nothing in such section even purports to grant to the Commission any power to increase rates to subscribers, or to act without a hearing.

There was no issue in this consolidated proceeding as to the Commission's ordering physical connections between telephone lines, nor did the Commission by its interim order attempt to direct the division of revenues among the four telephone corporations involved.

Section 701 is merely a general section granting powers to the Commission. But such powers must be exercised pursuant to law!

It cannot be that the Commission points to Section 766, with its specific requirement for hearings and further hearings as any authority for the proposition that the Commission can authorize increased telephone rates without a hearing. It cannot be that the Commission thus recognizes that it cannot divide the receipts of telephone companies among such companies except after a hearing and a further hearing, but nevertheless, contends that such section impliedly gives it the power to assess charges against the public without a proper hearing.

Section 728, which pertains to the "fixing of rates by commission" expressly requires a "hearing" before the Commission acts.

Conclusion.

The Commission has grossly erred in purporting to authorize an interim increase of rates in the Los Angeles extended area by its Decision No. 55936. That decision is wholly beyond the Commission's power and is wholly invalid: it affronts the 14th Amendment, the Constitution of California and the expressed legislative will of the people.

The Commission's powers are granted by the people of California and it is responsible to them to recognize the limits fixed upon those powers by the people. The requirement that there be a full hearing before the people can be assessed increased utility rates is one of the most fundamental and elementary conditions to the exercise of any of those powers.

The Commission should acknowledge the invalidity of its Decision No. 55936. It should promptly grant a rehearing on the matter. Likewise, it should forthwith set aside that decision. It should thereafter proceed in a law-

ful manner to a full consideration of such proposals for increased telephone rates as may be properly brought before it.

Dated this 19th day of December, 1957.

Respectfully submitted,

ROGER ARNEBERGH

Roger Arnebergh, City Attorney of the City of Los Angeles, an interested party

and

ROGER ARNEBERGH

Roger Arnebergh, a subscriber of The Pacific Telephone and Telegraph Company, an interested party

EXHIBIT "A"

State of California

SUMMARY OF RESULTS OF INTRASTATE OPERATIONS

First Six Months of 1957 (Annualized)
(Based on January thru June 1957 Actual Results)
1954 COMMISSION DECISION BASIS
(Thousands of Dollars)

TABLE 2
(Companion Table to Revised Table 4 of Exhibit 13, App. 39309)
Exhibit No.: 63
Witness: R. M. Cunningham
Date: 12-5-57

	Intrastate Operations	Intrastate Toll Operations	Exchange Operations					
			Total	S.F.-E.B. Ext'd Area	L.A. Ext'd Area	S.D. Ext'd Area	Remaining Exchanges No. Cal.	Remaining Exchanges So. Cal.
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)
A. GOING LEVEL (Exhibit 13, Revised Table 4, Item C)								
1. Revenues	$ 572,252	$135,976	$ 436,276	$128,566	$201,809	$20,622	$ 63,229	$22,050
2. Expenses and Taxes	494,331	122,202	372,129	106,262	170,535	18,260	56,862	20,210
3. Balance Net Revenues	77,921	13,774	64,147	22,304	31,274	2,362	6,367	1,840
4. Average Net Plant and Working Capital	1,317,026	224,447	1,092,579	299,139	445,958	55,463	221,723	70,296
5. Percent Return	5.92%	6.14%	5.87%	7.46%	7.01%	4.26%	2.87%	2.62%
B. EFFECT OF RECASTING—Amendment to Appl. 39309								
6. Revenues	—	—	—	—	—	—	—	—
7. Expenses and Taxes	5,478	1,560	3,918	1,724	1,725	191	34	244
8. Balance Net Revenues	(5,478)	(1,560)	(3,918)	(1,724)	(1,725)	(191)	(34)	(244)
9. Average Net Plant and Working Capital	(286)	(4)	(282)	(431)	(75)	(11)	263	(28)
C. MODIFIED GOING LEVEL (A & B)								
10. Revenues	572,252	135,976	436,276	128,566	201,809	20,622	63,229	22,050
11. Expenses and Taxes	499,809	123,762	376,047	107,986	172,260	18,451	56,896	20,454
12. Balance Net Revenues	72,443	12,214	60,229	20,580	29,549	2,171	6,333	1,596
13. Average Net Plant and Working Capital	1,316,740	224,443	1,092,297	298,708	445,883	55,452	221,986	70,268
14. Percent Return	5.50%	5.44%	5.51%	6.89%	6.63%	3.92%	2.85%	2.27%
D. PROPOSED RATES—Amendment to Appl. 39309								
15. Revenues	11,959	1,887	10,072	2,539	4,703	525	1,770	535
16. Expenses and Taxes	6,513	1,028	5,485	1,383	2,561	286	964	291
17. Balance Net Revenues	5,446	859	4,587	1,156	2,142	239	806	244
18. Average Net Plant and Working Capital	—	—	—	—	—	—	—	—
E. INCLUDING EFFECT OF PROPOSED RATES (C & D)								
19. Revenues	584,211	137,863	446,348	131,105	206,512	21,147	64,999	22,585
20. Expenses and Taxes	506,322	124,790	381,532	109,369	174,821	18,737	57,860	20,745
21. Balance Net Revenues	77,889	13,073	64,816	21,736	31,691	2,410	7,139	1,840
22. Average Net Plant and Working Capital	1,316,740	224,443	1,092,297	298,708	445,883	55,452	221,986	70,268
23. Percent Return	5.92%	5.82%	5.93%	7.28%	7.11%	4.35%	3.22%	2.62%
F. EFFECT OF PROPOSED RATES (Ex. 13, Revised Table 4 Item D)								
24. Revenues	28,641	5,160	23,481	5,509	16,065	380	1,097	430
25. Expenses and Taxes	15,599	2,811	12,788	3,001	8,749	207	597	234
26. Balance Net Revenues	13,042	2,349	10,693	2,508	7,316	173	500	196
27. Average Net Plant and Working Capital	—	—	—	—	—	—	—	—
G. INCLUDING EFFECT OF PROPOSED RATES AS AMENDED (E & F)								
28. Revenues	612,852	143,023	469,829	136,614	222,577	21,527	66,096	23,015
29. Expenses and Taxes	521,921	127,601	394,320	112,370	183,570	18,944	58,457	20,979
30. Balance Net Revenue	90,931	15,422	75,509	24,244	39,007	2,583	7,639	2,036
31. Average Net Plant and Working Capital	1,316,740	224,443	1,092,297	298,708	445,883	55,452	221,986	70,268
32. Percent Return	6.91%	6.87%	6.91%	8.12%	8.75%	4.66%	3.44%	2.90%

( ) Indicates Inverse Amount

Certificate of Service.

I Hereby Certify that on December 19, 1957, I served a copy of the Petition for Rehearing of the City of Los Angeles on each of the parties to this proceeding, and on each of the parties, not otherwise served, in the proceeding upon Application No. 38685, of the California Water & Telephone Company for a general rate increase, by mailing a copy thereof to each such party or to his attorney of record as hereafter listed.

Francis N. Marshall, Esq.
Arthur T. George, Esq.
Pillsbury, Madison & Sutro
225 Bush Street
San Francisco 4, California

Leland F. Reaves, City Attorney
City Hall
San Pablo, California

L. E. Langlois
785 Market Street
San Francisco, California

Bert Levy
508—16th Street
Oakland 12, California

J. J. Deuel and
Bert Buzzini
2223 Fulton Street
Berkeley 4, California

Dion R. Holm, City Attorney
Paul L. Beck, Chief Valuation and Rate Engineer
206 City Hall
San Francisco 2, California

Fred C. Hutchinson, City Attorney
Robert T. Anderson, Assistant City Attorney
Hall of Justice
Berkeley, California

Henry E. Jordan, Chief Engineer-Secretary
Bureau of Franchises and Public Utilities
Room 103 City Hall
Long Beach 2, California

John W. Collier, City Attorney
Edward A. Goggin, Deputy City Attorney
503 City Hall
Oakland, California

Sherrill D. Luke, Administrative Assistant to the City Manager
City Hall
Richmond, California

Robert P. Berkman
275 S. Murphy Avenue
Sunnyvale, California

Everett M. Glenn, City Attorney
307 City Hall
Sacramento, California

Neal C. Hasbrook
760 Market Street
San Francisco, California

Harold O. Davis, Vice President and General Manager
Western California Telephone Company
15 Montebello Way
Los Gatos, California

Saul M. Weingarten, City Attorney
708 Del Monte Boulevard
Seaside, California

E. A. Hosmer
E. A. Hosmer & Company
Kenwood, California

C. P. Kenyon, Executive Secretary
San Joaquin County Board of Supervisors
Stockton, California

Mary Moran Pajalich,
M. J. Kimball and John F. Donovan
Public Utilities Commission Staff
State Building—Civic Center
San Francisco 2, California

Lew Lauria
6087 Sunset Boulevard
Hollywood 28, California

O. A. Rieman
910 Central Tower
703 Market Street
San Francisco, California

W. J. Varley
1139 Mission Street
San Francisco, California

Aaron W. Reese, Assistant City Attorney
Frederick B. Holoboff, Deputy City Attorney
Civic Center
San Diego, California

Frank L. Kostlan, City Attorney
202 City Hall
Pasadena 1, California

Warren A. Palmer, Esq.
Orrick, Dahlquist, Herrington and Sutcliffe
405 Montgomery Street
San Francisco, California

Claude N. Rosenberg, Esq.
William Fleckles, Esq.
Bacigalupi, Elkus and Salinger
300 Montgomery Street
San Francisco, California

John Robert Jones, Esq.
Albert M. Hart, Esq.
2020 Santa Monica Boulevard
Santa Monica, California

Allan R. Stacey
8000 Foothill Boulevard
Sunland, California

Edward M. Berol, Esq.
Bruce R. Geernaert, Esq.
Berol & Silver
100 Bush Street
San Francisco 4, California

Malcolm D. Miller
General Services Administration
18th and "F" Streets, N. W.
Washington 25, D. C.

Clarence W. Hull, Regional Counsel
49 Fourth Street
San Francisco, California

Bruce McKnight
American Trust Building
Stockton, California

B. M. McCormick, President
6829 Rugby
Huntington Park, California

Walhfred Jacobson, City Attorney
Leslie E. Still, Deputy City Attorney
600 City Hall
Long Beach, California

W. D. MacKay
Commercial Utility Service
111 West 5th Street
Los Angeles 13, California

George W. Smith
202 North Rose
Compton, California

Carl J. Ellis
5218 Bellflower Boulevard
Lakewood, California

Dated at Los Angeles, California this 19th day of December, 1957.

E. B. HARLIN
E. B. Harlin

APPENDIX D.

BEFORE THE

Public Utilities Commission of the State of California

Application No. 39309

In the Matter of the Application of THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, for authority to increase certain intrastate rates and charges applicable to telephone service furnished within the State of California.

Case No. 5974

CALIFORNIA WATER & TELEPHONE COMPANY, a corporation,
Complainant,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Defendant.

Case No. 5983

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Complainant,

vs.

GENERAL TELEPHONE COMPANY OF CALIFORNIA, a corporation, CALIFORNIA WATER & TELEPHONE COMPANY, a corporation, and SUNLAND-TUJUNGA TELEPHONE COMPANY, a corporation,
Defendants.

Joint Petition for a Rehearing by City of Long Beach; and by D. Patrick Ahern, John F. Baker, William T. Dalessi, Gerald Desmond, Charles Dooley, Charles M. Garrison, Walhfred Jacobson, Ray C. Kealer, Lewis D. Reese and Virgil H. Spongberg, as Ratepayers and Individuals.

Pursuant to the provisions of Sections 1731-1736 of the California Public Utilities Code, the City of Long Beach, and D. Patrick Ahern, John F. Baker, William

T. Dalessi, Gerald Desmond, Charles Dooley, Charles M. Garrison, Walhfred Jacobson, Ray C. Kealer, Lewis D. Reese and Virgil H. Spongberg, as ratepayers and individuals, appearing *in propria persona*, all interested parties in this consolidated proceeding, respectfully apply to the Commission for a rehearing herein as to the matters determined by the Interim Opinion and Interim Order contained in Decision No. 55936, dated December 10, 1957, and your Petitioners respectfully submit that said Decision No. 55936 and the Interim Order contained therein are erroneous and unlawful for the reasons and on the grounds hereinafter specified.

Grounds Upon Which Petitioners Consider Decision No. 55936 to Be Unlawful.

1. The Commission acted without authority and lacked jurisdiction to issue its interim order contained in Decision No. 55936 resulting in changes in mileage steps and increases in charges to the customers of the four companies serving the Los Angeles Extended Area insofar as said order affects the companies other than Pacific, as no issue pertaining to a rate increase has been raised in this consolidated proceeding by any company except Pacific.

2. The Commission lacked jurisdiction and acted without authority in making its interim order contained in Decision No. 55936 in the absence of a full-scale hearing on the operations of all four companies in connection with applications by all for rate increases.

3. The Commission's action in issuing Decision No. 55936 was unreasonable, arbitrary, discriminatory and an abuse of discretion in finding and determining, without conducting a full and complete hearing in this consoli-

dated proceeding and on the meager showings made, that the four companies are now conducting their interchanged multi-message unit operations at revenue levels producing returns below those which are fair and reasonable for such services, and that such revenue levels should be increased immediately.

4. The Commission acted without authority and lacked jurisdiction to issue said Decision No. 55936 for the reason that none of the four companies sustained their burden of proof that there now exists an emergency resulting from the financial position of any one of the utilities, and therefore there was no legal basis for the interim order.

5. That said Decision No. 55936 is violative of that portion of Section 1 of the 14th Amendment to the United States Constitution which reads as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

and is violative of Article I, Section 13, Clause 6 of the Constitution of the State of California, which reads as follows:

> "No person shall * * * nor be deprived of life, liberty, or property without due process of law; * * *"

Argument in Support of Rehearing.

1. By its Application No. 39309 Pacific seeks authority to increase certain intrastate rates and charges and in the proceedings on said application Pacific is entitled, from the procedural point of view, to seek an interim order for rate relief, subject to bearing the burden of

proof in that respect. Two complaint cases were consolidated with Pacific's application and these two cases involved a settlement agreement to which Pacific was a party. The parties involved in these cases were California, General, Sunland-Tujunga and Pacific. During its rate increase proceeding Pacific filed a motion for interim rate relief and this motion was joined in by the other three companies. Almost immediately, and without adequate notice being given to numerous affected ratepayers, including your Petitioners, hearings were held by the Commission on said motion in San Francisco. At the time said motion was made California had an application for a rate increase then pending, but it was not consolidated with the Pacific application. Neither General nor Sunland-Tujunga had an application for a rate increase on file at the time said motion was filed with the Commission. General subsequently filed an application for a rate increase, but its application has never been consolidated with Pacific's application and no hearing has yet been had. Sunland-Tujunga has not as yet filed an application for a rate increase, according to our information. Consequently, there is a procedural deficiency here in that no issue has been raised by any of the companies by way of an application in this proceeding for a rate increase except by Pacific.

2. In this consolidated proceeding only Pacific, of the four companies affected by this interim rate relief order, has made more than a token or summary showing. The other three companies have made only a token showing by way of a brief statement as to results of operations for 1957. The motion was taken under submission without adequate notice to the ratepayers of the areas served in the Los Angeles Extended Area by the three com-

panies, without adequate opportunity to cross-examine the witnesses of all four companies testifying in support of the motion, and without an opportunity for the Commission's staff or other interested parties to have sufficient time to present evidence in opposition to said motion. The claims of utilities of the penalties of regulatory lag do not justify the ignoring of rights of the ratepayers, either legally or morally.

3. General, California and Sunland-Tujunga find themselves involved in Pacific's rate increase proceedings by reason of a disagreement as to their four-party settlement agreement, and the resulting consolidation of the two complaint cases. Attached to the motion for interim rate relief was a copy of the proposed new settlement agreement. The effectiveness of the proposed new agreement was conditioned upon (a) its approval by the Commission, (b) reduction by each of the four companies of their mileage steps, and (c) increase in message unit charges at rates no less than 4.3 cents per message unit by each company. Decision No. 55936 specifically authorized only the reduction in mileage steps by each company, and accordingly the agreement will not become effective. The old settlement agreement has expired and there was testimony that no settlements were being made as of October 3 and 4, 1957. Thus, it would appear that the reason for making the interim rate order will not be justified as immediate benefit to the companies is questionable in the absence of any settlements.

The action of the Commission in making a finding that the four companies are now conducting their interchanged multi-message unit operations "at revenue levels which produce returns below those which are fair and reasonable for such services" when there has not been

an adequate opportunity to cross-examine the witnesses on whose testimony and evidence such a finding was based and when there has not been an adequate opportunity to present evidence in opposition thereto appears to be unreasonable, arbitrary and an abuse of discretion. With respect to the position of Sunland-Tujunga it does not appear that any additional evidence will necessarily be presented by it in support of such finding, nor will there be any opportunity to cross-examine any of its witnesses who have heretofore testified in this proceeding.

4. It is the position of your Petitioners that neither the applicant Pacific nor the other three telephone companies have sustained the burden of proof, as neither Pacific nor the other three companies have shown by clear and convincing evidence that there now exists an emergency financial condition that warrants the granting of immediate interim relief. The Commission, in a landmark decision (*Pacific Telephone and Telegraph Company* case, Decision No. 42530, 48 Cal. P. U. C. 487) on the issue of interim rate relief, held that it is necessary to find an *emergency* as a condition precedent to the granting of such relief. The Commission said at page 488:

> "* * * We conclude that this Commission has ample power and authority to grant an interim rate increase in this proceeding, provided that the record thus far developed discloses a state of facts warranting such relief. Therefore, the sole question before the Commission on this motion for an interim

rate increase is whether or not the record discloses an emergency condition that warrants the granting to this utility of immediate relief."

In later decisions the Commission has followed the principle laid down in the *Pacific Telephone and Telegraph* case (supra). In a 1951 decision (*Coast Counties Gas and Electric Company,* 50 Cal. P. U. C. 580) the Commission said:

"* * * We view an interim rate increase as an emergency measure, applicable only in the instance where the minimum financial obligations of the utility cannot be met prior to the establishment of definitive rates."

This same principle has been restated and followed in Decision No. 47245 (*Motor Truck Association of Southern California and Truck Owners Association of California,* 51 Cal. P. U. C. 758, 760) and in Decision No. 48743 (*Property Transportation Rates* in *San Francisco Bay Counties Territory,* 52 Cal. P. U. C. 606, 614).

Results of operations at present rates for estimated year 1957 showing per cent returns of 5.21% for California, 5.89% for General, 5.97% for Pacific and 5.67% for Sunland-Tujunga show very clearly that there is no present financial emergency facing any of these companies. In other words, the issue before the Commission is whether these utilities are now in a precarious or other serious financial position and not whether they are now earning or will earn a reasonable return. And with respect to General, in whose service area your Petitioners

are located, their own estimate for 1958 at present rates (prior to the interim order) indicated a return of 5.29%. That certainly does not represent an emergency financial condition, although General may claim it may not be a reasonable return on General's rate base which latter issue is to be determined in their recently filed case.

5. As was very clearly and fully developed at the hearing on this motion in San Francisco, no notice was given to the ratepayers in General's service area with respect to the hearing on said motion. The motion was filed in Pacific's rate increase proceedings and Pacific gave notice only to those ratepayers located within its service areas and with respect to its own rate increase application. When General joined in said motion no notice had been given its ratepayers. This resulted in a lack of opportunity for General's ratepayers to appear and cross-examine the witnesses testifying in support of said motion, and there was no adequate opportunity for interested parties to present testimony and evidence in opposition to said motion. This lack of notice and lack of adequate opportunity to cross-examine the witnesses testifying in support of said motion, in the opinion of your Petitioners, clearly constitutes a violation of constitutional rights guaranteed by the 14th Amendment to the Constitution of the United States and by Article 1, Section 13 of the Constitution of the State of California, and has deprived your Petitioners of their aforesaid constitutional rights.

Wherefore, Petitioners respectfully pray that this Honorable Commission grant a rehearing in this matter of all issues of fact and law with respect to the motion for interim rate relief; that Decision and Order No.

55936, dated December 10, 1957, be set aside and vacated; and for such other relief as may seem just and meet in the premises.

Respectfully submitted,

WALHFRED JACOBSON, City Attorney of the City of Long Beach
By /s/ Leslie E. Still, Jr.
LESLIE E. STILL, JR.
Deputy City Attorney
/s/ D. Patrick Ahern
D. PATRICK AHERN, in Propria Persona
/s/ John F. Baker
JOHN F. BAKER, In Propria Persona
/s/ William T. Dalessi
WILLIAM T. DALESSI, In Propria Persona
/s/ Gerald Desmond
GERALD DESMOND, In Propria Persona
/s/ Charles R. Dooley
CHARLES R. DOOLEY, In Propria Persona
/s/ Charles M. Garrison
CHARLES M. GARRISON, In Propria Persona
/s/ Walhfred Jacobson,
WAHLFRED JACOBSON, In Propria Persona
/s/ Ray C. Kealer
RAY C. KEALER, In Propria Persona
/s/ Lewis D. Reese
LEWIS D. REESE, In Propria Persona
/s/ Virgil H. Sponberg
VIRGIL H. SPONGBERG, In Propria Persona

Certificate of Service.

I hereby certify that I have this day served the foregoing document upon all known parties of record in this proceeding by first class mail a copy thereof properly addressed to each such party or his attorney.

Dated at Long Beach, California, this 20th day of December, 1957.

/s/ Leslie E. Still, Jr.
LESLIE E. STILL, JR.
Deputy City Attorney
City of Long Beach

APPENDIX E.

Decision No. 56048.

Before the Public Utilities Commission of the State of California.

In the Matter of the Application of The Pacific Telephone and Telegraph Company, a corporation, for authority to increase certain intrastate rates and charges applicable to telephone service furnished within the State of California. Application No. 39309.

California Water & Telephone Company, a corporation, Complainant, vs. Pacific Telephone and Telegraph Company, a corporation, Defendant. Case No. 5974.

The Pacific Telephone and Telegraph Company, a corporation, Complainant, vs. General Telephone Company of California, a corporation, California Water & Telephone Company, a corporation, and Sunland-Tujunga Telephone Company, a corporation, Defendants. Case No. 5983.

OPINION AND ORDER DENYING REHEARING.

The City of Los Angeles and Roger Arnebergh, as a subscriber of The Pacific Telephone and Telegraph Company, have filed their joint petition for rehearing respecting Decision No. 55936, rendered herein on December 10, 1957.

In fairness to the record herein, we are constrained to point out that Mr. Arnebergh is the City Attorney of Los Angeles and, as such, is participating in these proceedings on behalf of the City of Los Angeles through one of his assistants and participated in the matter of the motion for interim rate relief, hereafter referred to.

Said petition for rehearing, allegedly, is premised upon the following grounds:

"(1) This Commission was and is without jurisdiction, power or authority to grant or authorize increases in subscribers' telephone rates as provided by Decision No. 55936, or to grant or authorize any other increases in subscribers' telephone rates, without completing a full hearing and investigation of the affairs and operations of the telephone companies involved.

"(2) It has not been made to appear to the Commission that The Pacific Telephone and Telegraph Company ('Pacific') is in a precarious financial condition, or that any emergency requires that its revenues or earnings be increased by an interim order before the completion of a full hearing and investigation into Pacific's affairs. On the contrary Exhibit 31, Chapter 4, Table B, shows that as of December 31, 1956, the company had an unappropriated earned surplus of $87,387,322.40. The record further shows that present earnings under existing rates are more than adequate to meet all expenses, including payment of dividends to stockholders at current rates, and, in addition, add substantially to such surpluses.

"(3) Similarly, it has not been made to appear to the Commission that General Telephone Company of California ('General') California Water & Telephone Company ('California'), or Sunland-Tujunga Telephone Company ('Sunland'), is in a precarious financial condition or that any other emergency requires that its revenues or earnings be increased by an interim order, without the completion of a full hearing and investigation by the Commission of its affairs.

"Consequently, this Commission was and is without jurisdiction, power or authority to make the findings or

orders with respect to those telephone corporations which are provided by its Decision No. 55936, by interim order.

"(4) Until the Commission has held a full hearing, and after such hearing has found that the rates charged are insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential, the Commission is without jurisdiction, power, or authority to determine and fix, by order, the just, reasonable, or sufficient rate, and such hearing must include:

"(a) a full and complete presentation of evidence by the company or companies applying for such increase, which evidence, if not controverted, disproved, or discredited, would require an increase in rates;

"(b) a full opportunity to the public, representatives of municipalities and other interested parties to cross-examine applicant's witnesses;

"(c) an opportunity for the presentation of testimony and other evidence by the public, by representatives of municipalities, and other interested parties. Further, established practice has set the precedent of having a presentation made by the Commission's own staff, and it would be an abuse of discretion for the Commission to grant an increase in rates without first providing for a presentation of evidence by such staff, which is supported and paid for by the public for such purpose, among others.

"(5) The Commission is without jurisdiction, power or authority to make the findings or orders provided by its Decision No. 55936, by interim order.

"(6) The increases in rates to telephone subscribers authorized by Decision No. 55936 are applicable solely in the Los Angeles extended area. There was received in evidence in this consolidated proceeding Exhibit No. 63. Attached here, marked Exhibit "A", and by such ref-

erence made a part hereof, is a copy of Table 2 of such Exhibit 63. From evidence offered to the Commission by Pacific before the rendition of such decision on December 10, 1957, it appeared that in the first six months of 1957:

"(a) under present rates Pacific earned no less than 5.92% from its total intrastate operations;

"(b) although Pacific seeks rate increases to increase its total intrastate revenues by nearly $40,000,000 in order that its earnings therefrom will be at the rate of 6.91%, its earnings from its exchange operations within the Los Angeles extended area under present rates now exceed this rate of 6.91%.

"(c) Based on Pacific's actual operations during the first six months of 1957 its additional revenues solely from the increased rates authorized in the Los Angeles extended area would enable it to increase its earnings from total intrastate operations to 6.33%, by increases in its earnings from its exchange operations in the Los Angeles extended area from a minimum of 7.01% to at least 8.23%.

"The imposition upon the telephone subscribers in the Los Angeles extended area of such an unwarranted and unjustified burden is unreasonable, inequitable, discriminatory and unfair and on such account the Commission was and is without jurisdiction, power or authority to make the orders provided by Decision No. 55936, and such decision is unlawful."

The foregoing enumerated grounds are rationalized by petitioners in the succeeding pages of their petition and are restated in divers and sundry ways but the burden of the petition is that due process of law was denied petitioners, lawful notice of the proposed interim increase of

rates was not given, that the telephone companies involved were not entitled to a rate increase in the Los Angeles area and that the Commission was without jurisdiction to grant the interim rate increase without a full and complete showing by not only the telephone companies but, also, the Staff of the Commission and the protesting and interested parties.

The record in these proceedings and the law constitute a complete refutation of petitioners' unsupported allegations.

Rate relief may be granted to a public utility *ex parte* or after public hearing upon such notice as the Commission may prescribe. (Section 1707, Public Utilities Code; Clemmons v. Railroad Commission, 173 Cal. 254, 258.)

Furthermore, the Commission represents the public interest in the field of public utility regulation and is charged with the protection of that interest. (United States v. Merchants and Manufacturers Assn., 242 U. S. 178, 188, 61 L. ed. 233, 239; Hanlon v. Eshelman, 169 Cal. 200, 202-203; Sale v. Railroad Commission, 15 Cal. (2d) 612, 617-618.) The fact that a disappointed party makes unfounded charges in a petition for rehearing respecting Commission action is no proof that the Commission has failed to lawfully discharge its public trust.

It is elementary law that a regulatory body may grant interim rate relief pending the final decision in the proceeding.

The repeated assertion by petitioners in their petition for rehearing that a full hearing was not accorded the parties on the motion by the telephone companies for interim relief is incorrect and the record irrefutably so shows. Hearings on the two complaints were held on

September 19, 20, and 26, 1957. On the latter day (September 26, 1957) evidence was adduced relative to the multi-message unit traffic interchanged between the four companies in the Los Angeles extended area. On the third day of hearing in the application proceeding (September 27, 1957) the complaint matters were consolidated with the application proceeding. On that date the four telephone utilities made a motion for interim relief, and hearings thereon were held on September 27, October 3, 4, and 10, 1957. Petitioner City of Los Angeles appeared at all of the above hearings.

After the telephone companies had presented their evidence in support of such motion and the protesting and interested parties including the City of Los Angeles, had cross-examined the witnesses for the telephone companies, the presiding officer inquired of these parties if they had any evidence to offer in connection with the motion for interim relief and they answered in the negative. No suggestion or request was made by any of these parties for a continuance to enable said parties to present evidence. Also, the motion for interim rate relief was argued by the parties, including the City of Los Angeles and other protesting and interested parties. In these circumstances, the repeated insinuation of petitioners that the interested parties were denied an opportunity to be heard and that a full hearing was not had on the motion for interim relief is disingenuous, to say the very least.

After careful consideration of petitioners' numerous objections, we fail to find any of them meritorious.

The petition for rehearing having been filed in time to suspend the order until granting or denial of rehearing, it is necessary to amend the order to provide that

the revised tariff schedules shall become effective for service furnished on and after a date later than that specified in the decision. Therefore, It Is Ordered that ordering paragraphs 1, 2, and 3 of Decision No. 55936 are hereby amended by substituting for the words "January 6, 1958" the words "January 20, 1958."

It Is Further Ordered that the petition for rehearing filed herein be and the same is hereby denied.

Dated at San Francisco, California, this 7th day of January, 1958.

PETER E. MITCHELL
President

RAY E. UNTEREINER
MATTHEW J. DOOLEY
REX HARDY
C. LYN FOX
Commissioners

APPENDIX F.

Decision No. 56049.

Before the Public Utilities Commission of the State of California.

In the Matter of the Application of The Pacific Telephone and Telegraph Company, a corporation, for authority to increase certain intrastate rates and charges applicable to telephone service furnished within the State of California. Application No. 39309.

California Water & Telephone Company, a corporation, Complainant, vs. The Pacific Telephone and Telegraph Company, a corporation, Defendant. Case No. 5974.

The Pacific Telephone and Telegraph Company, a corporation, Complainant, vs. General Telephone Company of California, a corporation, California Water & Telephone Company, a corporation, and Sunland-Tujunga Telephone Company, a corporation, Defendants. Case No. 5983.

Order Denying Rehearing.

City of Long Beach, and D. Patrick Ahern, John F. Baker, William T. Dalessi, Gerald Desmond, Charles Dooley, Charles M. Garrison, Wahlfred Jacobson, Ray C. Kealer, Lewis D. Reese and Virgil H. Spongberg, as ratepayers and individuals, having filed their joint petition for rehearing respecting Decision No. 55936, rendered herein on the 10th day of December, 1957; the Commission having considered said petition and finding no cause for granting the same,

It Is Ordered that said petition for rehearing, filed herein, be and the same is hereby denied.

Dated at San Francisco, California, this 7th day of January, 1958.

PETER E. MITCHELL
President

RAY E. UNTEREINER
MATTHEW J. DOOLEY
REX HARDY
C. LYN FOX
Commissioners

APPENDIX G.

Excerpts From Relevant Constitutional and Statutory Provisions.

From Section 1, Fourteenth Amendment to the Constitution of the United States:

". . . No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

From Article XII of the Constitution of the State of California:

"Section 22. The Railroad Commission is continued in existence as the Public Utilities Commission, which shall consist of five members. The commission shall be appointed by the Governor from the State at large; . . . No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission. The act of a majority of the commissioners when in session as a board shall be deemed to be the act of the commission; but any investigation, inquiry or hearing which the commission has power to undertake or to hold may be undertaken or held by or before any commissioner designated for the purpose by the commission, and every order made by a commissioner so designated, pursuant to such inquiry, investigation or hearing, when approved or confirmed by the commission and ordered filed in its office, shall be deemed to be the order of the commission.

"* * *

"No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Public Utilities Commission additional pow-

ers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Public Utilities Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution.

"* * *

"Whenever in this Constitution or the laws of this State 'Railroad Commission' is used, it shall be deemed to refer to the Public Utilities Commission.

"Section 23. Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any . . . plant, or equipment, or any part of such . . . plant or equipment within this State, . . . for the transmission of telephone . . . messages, . . . either directly or indirectly, to or for the public, and every common carrier, is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission as may be provided by the Legislature, and every class of private corporations, individuals, or associations of individuals hereafter declared by the Legislature to be public utilities shall likewise be subject to such control and regulation. The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution. . . ."

From the Public Utilities Code of the State of California:

"Section 20. 'Commission' means the Public Utilities Commission created by Section 22 of Article XII of the State Constitution, and 'commissioner' means a member of the commission."

"Section 216.(a) 'Public utility' includes every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger, warehouseman, and heat corporation, where the service is performed for or the commodity delivered to the public or any portion thereof."

"Section 304. . . . The commissioners shall be civil executive officers. . . ."

"Section 310. . . . The evidence in any investigation, inquiry, or hearing may be taken by the commissioner or commissioners to whom such investigation, inquiry, or hearing has been assigned or, in his or their behalf, by an examiner designated for that purpose. . . ."

"Section 451. All charges demanded or received by any public utility, or by any two or more public utilities, for . . . any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such . . . service is unlawful.

"* * *

"All rules made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable."

"Section 453. No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant

any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. The commission may determine any question of fact arising under this section."

"Section 454. No public utility shall raise any rate or so alter any classification, contract, practice, or rule as to result in any increase in any rate except upon a showing before the commission and a finding by the commission that such increase is justified."

"Section 455. Whenever any schedule stating an individual or joint rate, classification, contract, practice, or rule, not increasing or resulting in an increase in any rate, is filed with the commission, it may, either upon complaint or upon its own initiative, at once and if it so orders without answer or other formal pleadings by the interested public utility or utilities, but upon reasonable notice, enter upon a hearing concerning the propriety of such rate, classification, contract, practice, or rule. Pending the hearing and the decision thereon such rate, classification, contract, practice or rule shall not go into effect. The period of suspension of such rate, classification, contract, practice, or rule shall not extend beyond 120 days beyond the time when it would otherwise go into effect unless the commission extends the period of suspension for a further period not exceeding six months. On such hearing the commission shall establish the rates, classifications, contracts, practices, or rules proposed, in whole or in part, or others in lieu thereof, which it finds to be just and reasonable.

"All such rates, classifications, contracts, practices, or rules not so suspended shall become effective on the expiration of 30 days from the time of filing thereof with the commission or such lesser time as the commission may grant, subject to the power of the commission, after a hearing had on its own motion or upon complaint, to alter or modify them."

"Section 489. Under such rules as the commission prescribes, every public utility other than a common carrier shall file with the commission within such time and in such form as the commission designates, and shall print and keep open to public inspection, schedules showing all rates, tolls, rentals, charges, and classifications collected or enforced, or to be collected or enforced, together with all rules, contracts, privileges, and facilities which in any manner affect or relate to rates, tolls, rentals, classifications, or service. Nothing in this section shall prevent the commission from approving or fixing rates, tolls, rentals, or charges, from time to time, in excess of or less than those shown by such schedules."

"Section 490. The commission may from time to time determine and prescribe by order such changes in the form of the schedules referred to in this article as it finds expedient, and may modify the requirements of any of its orders or rules in respect to any matter referred to in this article."

"Section 491. Unless the commission otherwise orders, no change shall be made by any public utility in any rate or classification, or in any rule or contract relating to or affecting any rate, classification, or service, or in any privilege or facility, except after 30 days' notice to the commission and to the public. Such notice shall be given by

filing with the commission and keeping open for public inspection new schedules stating plainly the changes to be made in the schedule or schedules then in force, and the time when the changes will go into effect. The commission, for good cause shown, may allow changes without requiring the 30 days' notice, by an order specifying the changes so to be made, the time when they shall take effect, and the manner in which they shall be filed and published. When any change is proposed in any rate or classification, or in any form of contract or agreement or in any rule or contract relating to or affecting any rate, classification, or service, or in any privilege or facility, attention shall be directed to such change on the schedule filed with the commission, by some character to be designated by the commission, immediately preceding or following the item."

"Section 701. The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

"Section 728. Whenever the commission, after a hearing, finds that the rates or classifications, demanded, observed, charged, or collected by any public utility for or in connection with any service, product, or commodity, or the rules, practices, or contracts affecting such rates or classifications are insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential, the commission shall determine and fix, by order, the just, reasonable or sufficient rates, classifications, rules, practices, or contracts to be thereafter observed and in force."

"Section 729. The commission may, upon a hearing, investigate a single rate, classification, rule, contract, or

practice, or any number thereof, or the entire schedule or schedules of rates, classifications, rules, contracts, and practices, or any thereof, of any public utility, and may establish new rates, classifications, rules, contracts, or practices or schedule or schedules in lieu thereof."

"Section 734. When complaint has been made to the commission concerning any rate for any product or commodity furnished or service performed by any public utility, and the commission has found, after investigation, that the public utility has charged an unreasonable, excessive, or discriminatory amount therefor in violation of any of the provisions of this part, the commission may order that the public utility make due reparation to the complainant therefor, with interest from the date of collection if no discrimination will result from such reparation. No order for the payment of reparation upon the ground of unreasonableness shall be made by the commission in any instance wherein the rate in question has, by formal finding, been declared by the commission to be reasonable, and no assignment of a reparation claim shall be recognized by the commission except assignments by operation of law as in cases of death, insanity, bankruptcy, receivership, or order of court."

"Section 735. If the public utility does not comply with the order for the payment of reparation within the time specified in the order, suit may be instituted in any court of competent jurisdiction to recover the payment within one year from the date of the order, and not after. . . ."

"Section 1001. No . . . telephone corporation . . . shall begin the construction of . . . a line, plant, or system, or of any extension thereof, without having first obtained from the commission a certificate that the present

or future public convenience and necessity require or will require such construction.

". . . If any public utility, in constructing or extending its line, plant, or system, interferes or is about to interfere with the operation of the line, plant, or system of any other public utility, already constructed, the commission, on complaint of the public utility claiming to be injuriously affected, may, after hearing, make such order and prescribe such terms and conditions for the location of the lines, plants, or systems affected as to it may seem just and reasonable."

"Section 1701. All hearings, investigations, and proceedings shall be governed by this part and by rules of practice and procedure adopted by the commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision or rule made, approved, or confirmed by the commission."

"Section 1702. Complaint may be made by the commission of its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, or any body politic or municipal corporation, by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission. No complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness

of any rates or charges of any gas, electrical, water, or telephone corporation, unless it is signed by the mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the city or city and county within which the alleged violation occurred, or by not less than 25 actual or prospective consumers or purchasers of such gas, electricity, water, or telephone service."

"Section 1705. At the time fixed for any hearing before the commission or a commissioner, or the time to which the hearing has been continued, the complainant and the corporation or person complained of, and such corporations or persons as the commission allows to intervene, shall be entitled to be heard and to introduce evidence. The commission shall issue process to enforce the attendance of all necessary witnesses. After the conclusion of the hearing, the commission shall make and file its order, containing its decision. A copy of such order, certified under the seal of the commission, shall be served upon the corporation or person complained of, or his or its attorney. The order shall, of its own force, take effect and become operative 20 days after the service thereof, except as otherwise provided, and shall continue in force either for a period designated in it or until changed or abrogated by the commission. If the commission believes that an order cannot be complied with within 20 days, it may prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may on application and for good cause shown, extend the time for compliance fixed in its order."

"Section 1706. A complete record of all proceedings and testimony before the commission or any commissioner on any formal hearing shall be taken down by a reporter

appointed by the commission, and the parties shall be entitled to be heard in person or by attorney. In case of an action to review an order or decision of the commission, a transcript of such testimony, together with all exhibits or copies thereof introduced, and of the pleadings, record, and proceedings in the cause, shall constitute the record of the commission, but if the petitioner and the commission stipulate that certain questions alone and a specified portion only of the evidence shall be certified to the Supreme Court for its judgment, such stipulation and the questions and the evidence therein specified shall constitute the record on review."

"Section 1707. Any public utility may complain on any of the grounds upon which complaints are allowed to be filed by other parties, and the same procedure shall be adopted and followed as in other cases, except that the complaint may be heard *ex parte* by the commission or may be served upon any parties designated by the commission."

"Section 1709. In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive."

"Section 1731. After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing. The commission may grant and hold a rehearing on those matters, if in its judgment sufficient reason is made to appear. No cause of action arising out of any order or decision of the commission shall accrue in

any court to any corporation or person unless the corporation or person has made, before the effective date of the order or decision, application to the commission for a rehearing."

"Section 1732. The application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in the application."

"Section 1733. Any application for a rehearing made 10 days or more before the effective date of the order as to which a rehearing is sought, shall be either granted or denied before the effective date, or the order shall stand suspended until the application is granted or denied. Any application for a rehearing made within less than 10 days before the effective date of the order as to which a rehearing is sought, and not granted within 20 days, may be taken by the party making the application to be denied, unless the effective date of the order is extended for the period of the pendency of the application."

"Section 1756. Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable not later than 30 days after the date of issuance, and shall direct the commission to certify its record in the case to the court. On the return day, the cause shall be heard by the Supreme Court, unless for a good reason shown it is continued."

"Section 1757. No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination."

"Section 1758. The commission and each party to the action or proceeding before the commission may appear in the review proceeding. Upon the hearing the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the commission. The provisions of the Code of Civil Procedure relating to writs of review shall, so far as applicable and not in conflict with the provisions of this part, apply to proceedings instituted in the Supreme Court under the provisions of this article."

"Section 1759. No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases."

"Section 1760. In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final."

"Section 1761. The pendency of a writ of review shall not of itself stay or suspend the operation of the order or decision of the commission, but during the pendency of the writ the Supreme Court in the manner provided in this article in its discretion may stay or suspend in whole or in part the operation of the commission's order or decision."

SUPREME COURT. U. S.

FILED
FEB 18 1959
JAMES R. BROWNING, Clerk

In the Supreme Court
OF THE
United States

October Term, 1958

No. 656

The City of Los Angeles, a municipal corporation, the City of Long Beach, a municipal corporation, Roger Arnebergh and Walfred Jacobson,

Appellants,

vs.

The Public Utilities Commission of the State of California, and C. Lyn Fox, Peter E. Mitchell, Matthew J. Dooley, Theodore H. Jenner and Everett C. McKrage, as members of and constituting the said Public Utilities Commission,

Appellees.

On Appeal from the Supreme Court of the State of California.

MOTION TO DISMISS APPEAL.

Roderick B. Cassidy,
Acting Chief Counsel,
J. Thomason Phelps,
Principal Counsel,
Mary Moran Pajalich,
Senior Counsel,
514 State Building,
San Francisco 2, California,
Attorneys for Appellees.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 656

THE CITY OF LOS ANGELES, a municipal corporation, the CITY OF LONG BEACH, a municipal corporation, ROGER ARNEBERGH and WALHFRED JACOBSON,

Appellants,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and C. LYN FOX, PETER E. MITCHELL, MATTHEW J. DOOLEY, THEODORE H. JENNER and EVERETT C. McKEAGE, as members of and constituting the said Public Utilities Commission,

Appellees.

On Appeal from the Supreme Court of the State of California.

MOTION TO DISMISS APPEAL.

The Public Utilities Commission of the State of California and C. Lyn Fox, Peter E. Mitchell, Matthew J. Dooley, Theodore H. Jenner and Everett C. McKeage,

as members of and constituting the said Public Utilities Commission, appearing herein as appellees, move this Court to dismiss for want of jurisdiction the appeal taken herein to this Court by the City of Los Angeles, a municipal corporation, the City of Long Beach, a municipal corporation, Roger Arnebergh and Walhfred Jacobson, appellants, upon the following grounds:

I. The issue raised by appellants is moot.

II. The appeal does not present a substantial federal question.

III. Appellants cannot invoke the privileges and immunities provisions of the Constitution.

STATEMENT.

Appellants have chosen to appeal from the judgment of the Supreme Court of the State of California denying appellants' petition for writ of review of an *interim* or interlocutory order of appellee Public Utilities Commission of the State of California and the members thereof. While certain increased charges became effective forty days after the date of said order, hearings in the proceeding continued, and, months later, after thorough and protracted hearings, a final order was entered. By the final order of appellee Commission, the interim or interlocutory decision was affirmed and made permanent.

In order to correct any misapprehension which might arise from appellants' statement of facts, the following statement of facts is set forth:

The Pacific Telephone and Telegraph Company filed its application for a general increase in its rates. These included rates for a class of service known as message unit and multiple message unit service in the Los Angeles Extended Area. This area is served not only by Pacific, but by General Telephone Company of California, California Water and Telephone Company and Sunland-Tujunga Telephone Company, each in its own territory. The facilities of all four companies are jointly used to afford interchanged multiple message unit service as a substitute for message toll service (long distance) within the area, and in the interest of uniformity, each company charges the same rates for such service and uses the same distance factors (mileage steps) in making its charges.

Public hearings, after *adequate notice* (see infra, p. 8), were held, commencing on September 25, 1957, at which time the Cities of Los Angeles and Long Beach appeared. Their City Attorneys Roger Arnebergh and Walhfred Jacobson did not appear in their individual capacities at that time. On September 26, the second day of hearing, in the presence of a representative of the City of Los Angeles, but in the absence of the representative of the City of Long Beach, Pacific's counsel stated that it was his company's intention to move for interim relief in conjunction with the three other connecting companies. On September 27, the four companies joined in a motion to decrease the length of the mileage steps which, coupled with a requested increase in the rates, would serve to increase the charges for the multiple message unit service in which they all participate. The mo-

tion was based on a showing that the return on the property dedicated to interchanged multiple message unit traffic for all four of the companies amounted to but 3.45%. Each company also submitted evidence showing that its over-all estimated operations for 1957 would produce the following return at then existing rates:

Pacific	5.97%	California Water and Telephone	5.21%
General	5.89%	Sunland	5.67%

Thereafter and on October 3, 4 and 10, 1957, public hearing on the motion was held. Representatives of appellant municipalities were present and participated therein, except that the City of Long Beach was absent on October 10th. The Presiding Commissioner asked them if they had any evidence to offer in connection with the motion for interim relief, and they replied in the negative. No request for additional time was made. Argument on the motion was had, in which appellant municipalities participated.

Thereafter and on December 10, 1957, the Commission by interim decision decreased the mileage steps for multiple message unit service so as to be identical with those provided for short-haul toll mileage steps, since both types of service have the same general characteristics, but refused any increase in the rate for such service. The decreasing of the mileage steps resulted in increased charges to subscribers effective January 20, 1958, and increased revenue to the four companies.

Petitions for rehearing were filed by the appellant cities, and *appearing in their individual capacities for*

the first time, by appellants Roger Arnebergh and Walhfred Jacobson. The petitions were denied.

Before the increases became effective, the Commission by Decision No. 56109 (56 Cal. P.U.C. 140) ordered that the four companies involved keep appropriate records to reflect the increases of rates paid to them by their customers pursuant to the interim decision complained of, to the end that refunds of such increases might be made to customers with interest should the California Supreme Court or any other court of competent jurisdiction annul the Commission's interim decision.

Thereafter the Cities of Los Angeles and Long Beach, and Roger Arnebergh and Walhfred Jacobson as individuals, petitioned the California Supreme Court for writ of review, which was denied without opinion. (50 Advance California Reports, No. 8, Minutes p. 2.)

Although it is only from this denial that appellants take this appeal, appellees, in order to put the matter in its proper frame of reference before this Court, desire to point out that between September 27, 1957, when the motion for interim relief was made by the telephone companies, and March 6, 1958, the date on which the entire proceeding was finally submitted subject to oral argument and written briefs, 28 days of public hearing were had. Between the dates of October 10, 1957, when argument on the motion for interim relief was concluded, and March 6, 1958, the date on which the entire proceeding was finally submitted subject to oral argument and written briefs, there were 25 days of public hearing. Between December 10, 1957, the date of the interim decision complained of, and March 6, 1958, 21 days of public hearing were held.

Any interested party had the opportunity to appear and be heard, and the City of Los Angeles, at least, was represented at each hearing, examined any witness it chose, introduced evidence on its own behalf and participated in oral argument and the filing of briefs. The City of Long Beach was represented at several of such hearings and participated therein.

No evidence was introduced at any time by either of appellee individuals.

A petition for rehearing filed by the City of Los Angeles and its City Attorney in his individual capacity was filed and denied; they then petitioned the Supreme Court of the State of California for a writ of review of that portion of the Commission's *final* decision which affirmed and ratified the interim decision. This also was denied without opinion. (51 Advance California Reports, No. 6, Minutes, p. 2.) Appellees here seek review only of the denial by the Supreme Court of the State of California of their petition for writ of review of the interim or interlocutory decision.

ARGUMENT.

I.

THE ISSUE RAISED BY APPELLANTS IS MOOT.

By appealing only from the denial by the California Supreme Court of writ of review of the Commission's interim decision, appellees seek to contain the consideration of this Court within narrow confines indeed. However, they cannot avoid the fact, as set forth in the foregoing

statement of facts, that between September 27, 1958, when the motion for interim relief was made by the four telephone companies, and March 5, 1958, the date of submission of the proceeding, 28 days of public hearing were had. Between October 10, 1957, when argument on the motion was concluded, and the date of submission of the entire proceding, there were 25 days of public hearing. Between December 10, 1957, the date of the interim decision complained of, and the date of final submission, there were 21 days of public hearing. After all of these days of hearing, appellee Commission by its final decision, after the receipt of additional evidence, found that the rate relief granted by its interim decision was justified, and affirmed it and made it permanent. (Decision No. 56652; 56 Cal. P U.C. 277, 23 P.U.R. 3d 209.)

Thus the interim decision has become merged in the final decision and there are no existing facts or rights arising out of the interim decision which remain undetermined by the final decision. Even if this Court for any reason were to overrule the California Supreme Court, which would have the effect of annulling the Commission's interim decision, the final decision of the Commission *in the same case* would still remain, and the final decision of the California Supreme Court denying review thereof *on the same issues* would still remain.

The issues raised by appellants in their appeal from the denial by the California Supreme Court to review of the Commission's interim decision are therefore moot.

II.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Entirely apart from being moot, (which of itself denies the substantiality of any federal question) the appeal presents no substantial federal question. The burden of appellants' complaint is that they "and those they represent as affected telephone subscribers" (Jurisdictional Statement, p. 3) have been deprived of their properties by State action without due process of law. This is predicated upon two propositions:

A. That they had not received due or adequate notice of hearing.

B. That the Commission's interim decision was rendered without full hearing.

A. Appellants Received Adequate Notice Although They Have No Constitutional Right Thereto.

As to the first proposition, the facts are that upon the filing of the application by Pacific for a general rate increase, (which included both the proposed shortening of the mileage steps subsequently authorized and the increase in the message unit rate subsequently refused by the Commission's interim decision) the following notice was given:

State officials, boards of supervisors of 51 California counties and the mayor of each city in California served by applicant, totaling 249, were notified of the filing of the application by Pacific, and advised that copies of the application, associated exhibits and proposed written testimony and accompanying exhibits could be obtained

upon request therefor. Notice of hearing was mailed by the Commission to certain state officials, the League of California Cities, County Supervisors' Association of California, District Attorneys' Association of California, California Farm Bureau Federation, California Independent Telephone Association, California Manufacturers Association, California State Grange, General Services Administration of the United States Government, Board of Public Utilities and Transportation of the City of Los Angeles, City Attorney and Chief Rate Engineer of the City and County of San Francisco, Telephone Answering System and Services of California, Army, Navy and Executive Agencies of the United States Government, all telephone companies in California, and certain individual subscribers. Also, the applicant was directed by appellee Commission to mail, and did mail, a copy of the notice of hearing to the Board of Supervisors and the District Attorney of each of the California counties served by applicant, and the Chief Administrative Officer and the City Attorney of each California city in which applicant rendered telephone service. In addition, applicant was required to and did publish notices of the filing of its application in approximately 239 California newspapers, including 71 in Southern California.

As a consequence, appellees assume, of the receipt of such notice, both of the appellant municipalities filed written appearances. Appellant City of Los Angeles appeared throughout the entire proceeding, and actively participated therein. Appellant City of Long Beach attended such hearings as it chose, and as a party, was mailed a notice of the date and place of every continued hearing.

Had the representative of the City of Long Beach chosen to appear on the second and third days of hearing, he, as well as the representative of the City of Los Angeles, would have been present when the four companies gave notice of their intention to move and thereafter made their motion for interim relief. As stated in the statement of facts, both municipalities participated in subsequent hearings on the motion and in argument on the motion.

A party who is actually present at a proceeding cannot urge that he had no notice of it, nor that notice was inadequate. (*United States v. Miller* (1943), 317 U.S. 369, 382, 87 L. ed. 336, 347; *Doty v. Love* (1935), 295 U.S. 64, 74, 79 L. ed. 1303, 1310.)

Moreover, appellant municipalities were afforded an opportunity to be heard. (See Statement herein, p. 2.)

As stated by this Court in *Market Street Railway Co. v. Commission,* 324 U.S. 548, 559, 89 L. ed. 1171, 1180:

> "But even if a more convincing showing were made that the Company had relevant evidence to be heard, we find no adequate excuse for the failure to offer it in the proceeding. No offer was rejected, no request for time to obtain such evidence was denied. A misapprehension by a litigant of the steps which its best interests require during a trial may be appealing grounds for a plea to the discretion of the hearing tribunal for another chance, but it is not grounds for our interference as a denial of constitutional rights."

As stated hereinbefore, appellants Roger Arnebergh and Walhfred Jacobson, who are the City Attorneys of the respective appellant municipalities, did not appear *in their individual capacities* until they joined *for the*

first time with the cities they represent in filing a petition for rehearing of the Commission's interim order. Having designated their assistants to represent the cities, it can scarcely be gainsaid that they, as individuals, had *actual notice* of the proceedings.

The claimed lack of notice is absolutely specious. Even if it had any merit, it would not present a substantial federal question. Public utility regulation was, historically, a legislative function. Rates of such utilities were fixed by the action of a state legislature or governing body of a city, and embodied in a statute or city ordinance. Whenever rates were changed, they were changed by the same process, i.e., legislative act. Individual citizens could not properly claim that they were constitutionally guaranteed notice or hearing when their own representatives enacted laws fixing or increasing rates. When regulatory commissions came into being as agents of the state, they continued to perform a legislative function in the same area. This Court has held that the prescription of public utility rates by a regulatory commission constitutes legislative action. (*Colorado Interstate Gas Co. v. Federal Power Commission,* 324 U.S. 581, 589, 590, 89 L. ed. 1206, 1216.)

While the California legislature might amend the Public Utilities Act of this State so as to require notice to each individual customer of a utility, it has not done so, but has followed the uniform rule prevailing throughout the United States. (*Clemmons v. Railroad Commission,* 173 Cal. 254, 257-258; Sec. 1707, California Public Utilities Code; *United States v. Merchants, etc. Assn.,* 242 U.S. 178, 188, 61 L. ed. 233, 239.)

This Court has considered this matter on a number of occasions and has decided contrary to the contention of appellants. The case of *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109, 110-115, 81 L. ed. 540, 542-545, is a good illustration. There, this Court pointed out that even a contract customer, who enjoyed a rate based upon a long-term contract entered into long before the state regulatory statute was enacted, had no right to notice or hearing as a condition precedent to the increasing of such contract rate. The decision in this case is relatively brief and a reading of it completely demolishes any thought that there is a constitutional right to notice and hearing. The *Midland* case was referred to approvingly by this Court in the very recent case of *United Gas Pipe Line Company v. Mobile Gas Service Corporation, et al.*, 350 U.S. 332, 337-338, 100 L. ed. 373, 383. The case of *Wichita Railroad & Light Co. v. Public Utilities Commission of Kansas*, 260 U.S. 48, 67 L. ed. 124, strongly relied upon by appellants as supporting their contention, gives them no support whatsoever and is no authority for the contention that a customer of a utility, either contract or non-contract customer, has a constitutional right to notice and hearing as a condition precedent to the lawful increase of the rates of a public utility. The later *Midland* case destroys any possible dicta that appears in the *Wichita* case, and the *United Gas Pipe Line Company* case clearly points out that all that the *Wichita* case did was to construe the requirements of a state statute and that the decision in the *Wichita* case was based purely upon statutory construction. (350 U.S. 332, 346, 100 L. ed. 373, 387.)

It is difficult to perceive any application of the case of *Hollis v. Kutz*, 255 U.S. 452, 65 L. ed. 727, to appellants' assertion that the case at bar presents a substantial federal question. This Court there found that gas consumers were not entitled to equal protection of the laws as against the right of the government to receive lower rates. The Court also interpreted the terms of a statute, and found that consumers might appeal upon their supposed constitutional ground without first having filed a formal complaint for hearing before the Commission.

B. The Interim Decision Did Not Violate Appellants' Constitutional Rights.

In California, a public utility may not increase its rates without a showing before the Commission and a finding by the Commission that such increase is justified. (Sec. 454, Public Utilities Code.) In this, California is different from the Federal jurisdiction and most State jurisdictions. In the Federal jurisdiction and in most State jurisdictions, a public utility is lawfully entitled to file a schedule of increased rates with the appropriate regulatory body and, unless the regulatory body suspends the effectiveness of such increased rates, they go into effect, usually, within thirty days. After the expiration of thirty days the increased rates become the legal rates which the customer must pay, although he has had no opportunity to be heard concerning the increase. No one may claim that this procedure is unlawful. This procedure is to be found in the Interstate Commerce Act, the Federal Power Act, the Federal Communications Act, and the Civil Aeronautics Act, and in several other Federal

statutes. The same procedure will be found in the law of, probably, a majority of the states. If the regulatory body refuses to suspend the increased rates, such action on the part of the regulatory body is not subject to judicial review. (*Carlsen v. United States* (3-Judge U.S. District Court), 107 Fed. Supp. 398, 399.)

In light of the foregoing history and unmistakable facts of regulatory procedure and the utter absence of any authority to the contrary, it is obvious that the rendering of an interim decision by appellee Commission pending full hearing, *which full hearing was thereafter held, resulting in a final decision which found that the interim increases were justified* AND OF WHICH FINAL DECISION APPELLANTS VOICE NO COMPLAINT, violated no constitutional right of appellants.

III.

APPELLANTS CANNOT INVOKE THE PRIVILEGES AND IMMUNITIES PROVISIONS OF THE CONSTITUTION.

Appellant municipalities, the Cities of Los Angeles and Long Beach, state (Jurisdictional Statement, p. 12) that:

> "In the proceedings below the appellant cities appeared in behalf of industrial, commercial and residential subscribers within their boundaries and in effect in behalf of all of the subscribers in the Los Angeles area who would otherwise have been without representation."

In the proceedings before the appellee Commission, appellant municipalities appeared on behalf of their respec-

tive cities only. As stated hereinbefore, appellant individuals appeared only after the rendition of the interim decision complained of, hence there was no evidence before appellee Commission that they would be individually affected in any way by the decision.

Appellees respectfully submit that (A) appellant municipalities and (B) appellant individuals have no right to invoke the privileges and immunities provisions of the Constitution.

A. The Appellant Cities.

Municipal corporations and political subdivisions established by a state for the government of its people are creatures of the state, whose power over them is not restrained by the provisions of the Fourteenth Amendment. (*Risty v. Chicago, R. I. & P. R. Co.,* 270 U.S. 378, 70 L. ed. 641.) They have no privileges or immunities which they may invoke against their creator (*Williams v. Mayor and City Council of Baltimore,* 289 U.S. 36, 77 L. ed. 1015) in respect of either their governmental or their proprietary activities. (*Pederson v. Portland,* 144 Ore. 437, 24 P. (2d) 1031.) As the appellee Public Utilities Commission is the agent of the State in the performance of the legislative duty of ratemaking, this principle of law applies to its legislative determinations. (*R.R. Commission v. Los Angeles R. Co.,* 280 U.S. 145, 156, 74 L. ed. 234, 329.)

While appellee Commission welcomes the appearance of municipal representatives and values their undoubted contributions to proceedings before it, it cannot acquiesce

in the assertion that such appearance confers any of the Federal constitutional privileges or immunities upon municipalities.

As to the assertion that the municipalities appear in behalf of "industrial, commercial and residential subscribers within their boundaries" (Jurisdictional Statement, p. 12) this Court has often ruled that one may not claim standing before it to vindicate the constitutional rights of some third party unless he shows that he himself is injured by the action complained of. Even though he does show a direct, substantial injury from application of a statute, this Court reiterated that he cannot challenge its validity unless he can show that he is within the class whose constitutional rights are allegedly infringed. This rule, this Court has said, is salutary and the Court's practice of adherence thereto should be followed except in such case where it would be difficult if not impossible for the persons whose denial of constitutional rights is asserted to present their grievance before any court, and if there is need to protect their fundamental rights. (*Barrows v. Jackson* (1952), 346 U.S. 249, 255-258, 97 L. ed. 1586, 1594-1597.)

Quite obviously, the instant proceeding does not come within the exceptions to this "salutary rule". No showing whatever was made that the municipalities would suffer a "direct, substantial injury" nor that "they are within the class whose constitutional rights are allegedly infringed", nor that the persons whose constitutional rights the municipalities seek to urge cannot assert their own grievances, nor that the constitutional rights of such persons need to be protected.

The statement that without the representation of the cities "all of the subscribers in the Los Angeles area . . . would otherwise have been without representation" (Jurisdictional Statement, p. 12) is erroneous.

By law, the California Public Utilities Commission has the obligation of protecting the public interest. (*Sale v. Railroad Commission*, 15 Cal. 2d 612, 617-618, 104 P. 2d 38, 41-42; *Hanlon v. Eshleman*, 169 Cal. 200, 202, 146 Pac. 656, 657; *Pac. Tel. and Tel. Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119.)

This Court has stated on numerous occasions that regulatory agencies protect the public interest.

> ". . . it is only necessary to say that the commission represents the public and especially the subscribers, and they are properly bound by the decree." (*Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587, 592, 70 L. ed. 747, 749.)

In a proceeding involving the Interstate Commerce Commission, this Court declared:

> "The carrier is the only necessary party to the proceeding under § 4. The Commission represents the public." (*United States v. Merchants etc. Assn.*, 242 U.S. 178, 188, 61 L. ed. 233, 239.)

B. The Appellant Individuals.

The appellant individuals have no standing to assert any denial of constitutional rights herein.

The appellant individuals did not appear in the proceedings before appellee Commission until they joined, in their individual capacities, with the cities they represent as City Attorneys in filing a petition for rehearing of

the herein assailed decision with the appellee Commission. Therefore the record is devoid of any showing that they are affected in any way whatever by the interim decision which allegedly denies their constitutional rights.

This Court has ruled that such a showing is an essential condition precedent to the assertion of a claim of violation of constitutional right. In *Bode v. Barrett,* 344 U.S. 583, 585, 97 L. ed. 567, 570, we find:

> "No showing has been made by any of the appellants that the tax bears no reasonable relation to the use he makes of the highways . . . No effort is made to show that in that way or in some other manner the tax is increased by reason of the interstate operations of any appellant. In short *appellants have failed to carry the burden* of showing that the tax deprives them of rights which the Commerce Clause protects. (Citing cases.)" (Emphasis supplied.)

On page 586, we further find:

> "Appellants make other arguments to the effect that the statute is so inconsistent, vague, and uncertain in its classification as to violate the Equal Protection Clause of the Fourteenth Amendment. But even if we assume that the vagaries of the law reach that dignity, *no showing is made* that any of the appellants is the victim of an invidious classification. (Citing cases.)" (Emphasis supplied.)

CONCLUSION.

Appellees respectfully move that the appeal herein be dismissed, since the issue raised by appellants is moot, since the appeal does not present a substantial federal question, and since appellants cannot invoke the privileges and immunities provisions of the Constitution.

Dated, San Francisco, California,
February 16, 1959.

Respectfully submitted,

RODERICK B. CASSIDY,
Acting Chief Counsel,
J. THOMASON PHELPS,
Principal Counsel,
MARY MORAN PAJALICH,
Senior Counsel,
Attorneys for Appellees.

SUPREME COURT. U. S.

FILED

FEB 18 1959

JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1958

No. 656

THE CITY OF LOS ANGELES, a municipal corporation, the CITY OF LONG BEACH, a municipal corporation, ROGER ARNEBERGH and WALHFRED JACOBSON,

Appellants,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and C. LYN FOX, PETER E. MITCHELL, MATTHEW J. DOOLEY, THEODORE H. JENNER and EVERETT C. McKEAGE, as members of and constituting the said Public Utilities Commission,

Appellees.

On Appeal from the Supreme Court of the State of California.

MOTION TO DISMISS APPEAL.

ARTHUR T. GEORGE,
140 New Montgomery Street, San Francisco 5, California,
FRANCIS N. MARSHALL,
225 Bush Street, San Francisco 4, California,
Attorneys for The Pacific Telephone and Telegraph Company, Appellee.
JOHN ROBERT JONES,
Beacon Building, 50 West Gay Street, Columbus 15, Ohio,
Attorney for General Telephone Company of California, Appellee.
ALVIN H. PELAVIN,
300 Montgomery Street, San Francisco 4, California,
Attorney for California Water & Telephone Company, Appellee.
WARREN A. PALMER,
405 Montgomery Street, San Francisco 4, California,
Attorney for Sunland-Tujunga Telephone Company, Appellee.

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Supreme Court of the United States

OCTOBER TERM, 1958

No. 656

THE CITY OF LOS ANGELES, a municipal corporation, the CITY OF LONG BEACH, a municipal corporation, ROGER ARNEBERGH and WALHFRED JACOBSON,

Appellants,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and C. LYN FOX, PETER E. MITCHELL, MATTHEW J. DOOLEY, THEODORE H. JENNER and EVERETT C. McKEAGE, as members of and constituting the said Public Utilities Commission,

Appellees.

On Appeal from the Supreme Court of the State of California.

MOTION TO DISMISS APPEAL.

The Pacific Telephone and Telegraph Company, General Telephone Company of California, California Water & Telephone Company and Sunland-Tujunga Telephone Company, appearing herein as appellees,[1] move this Court

[1]These corporations are the real parties in interest against which appellants' attack upon the Public Utilities Commission of California is directed. They were parties to the proceedings be-

to dismiss for want of jurisdiction the appeal taken herein to this Court by The City of Los Angeles, a municipal corporation, the City of Long Beach, a municipal corporation, Roger Arnebergh and Walhfred Jacobson, appellants, upon the following grounds:

1. The appellants have no standing to assert in this Court the constitutional claims specified in the Jurisdictional Statement.

2. The issue raised by appellants is moot.

3. The appeal does not present a substantial federal question.

4. As to the individual appellants, the judgment of the Supreme Court of California rests on an adequate non-federal basis.

OPINIONS BELOW.

The judgment of the Supreme Court of California denying a writ of review (Appx. A)[2] was rendered without

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fore the Public Utilities Commission of California and participated therein. The challenged order of the Commission directly affected the rates to be charged by these four corporations. Under California law they were entitled to appear and did appear in the proceedings before the Supreme Court of California as respondents (Public Utilities Code, sec. 1758, quoted in the Jurisdictional Statement, Appendix G, p. 78). Having this status, they are parties in interest here and have standing to move to dismiss the appeal for want of jurisdiction. See *Southern Pacific Co. v. Public Utilities Commission of California* (October Term, 1953, No. 43) 346 U.S. 346.

[2]Reference herein to appendices are to those appended to the Jurisdictional Statement. "Jur.St." followed by a page number refers to pages of the text of the Jurisdictional Statement. "Ans. Pac." followed by a page number refers to the Answer of The Pacific Telephone and Telegraph Company, General Telephone Company of California, California Water & Telephone Company, and Sunland-Tujunga Telephone Company (Appearing as Re-

opinion. It is reported in 50 Advance California Reports, No. 8, Minutes, page 2. The decision of the Public Utilities Commission of California (Decision No. 55936, Appx. B, p. 3) is reported in 56 Cal.P.U.C. 80.

THE QUESTIONS PRESENTED.

Appellants state that the question presented is whether the due process clause entitles public utility customers to a hearing by a state public utility commission before the latter may authorize increases in charges for a utility's services (Jur.St. 7).[3] In other words, their claim is solely one of procedural due process, based upon the charge that they were not accorded notice or a fair hearing before the Commission entered its interim order authorizing the increased rates.

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spondents under Public Utilities Code Section 1758) to Petition for Writ of Review, filed in the Supreme Court of California, which is part of the record filed with the Clerk of this Court.

[3]Appellants attempt to lend color to their stated question by adding purported characterizations of the background against which they say the question arises (Jur.St. 7). The purported characterizations do not reflect the actual situation. Contrary to appellants' assertion, the state law does provide "for conditional increases pending a hearing before the Commission and for refunds of such increases according to a subsequent determination upon such hearing" (Jur.St. 7). The very judgment below sustained the Commission's power to order interim relief. This was an issue of state law before the California Supreme Court (see Ans.Pac. 55-56) and was decided adversely to appellants' contention (infra, pp. 12-13). Furthermore, before the interim rate increases became effective, the Commission, by its Decision No. 56109, 56 Cal.P.U.C. 140, required the keeping of records so that appropriate refunds might be made if Decision No. 55936 should be annulled (Jur.St. 10 n.). Also, the challenged order of the Commission (Decision No. 55936, 56 Cal.P.U.C. 80) did not make anything "due, owing and payable" (Jur.St. 7), but simply authorized certain increased charges for future services.

Actually, the appeal presents the questions (1) whether the appellants or any of them have standing to urge their claim in this Court, (2) whether their claim has not become moot through the final rate order of the Commission (Decision No. 56652; 56 Cal.P.U.C. 277, 23 PUR 3d 209), which, after 22 additional days of hearing, reaffirmed and made permanent the interim rates, (3) whether in point of fact appellants did not have full notice and hearing before issuance of the interim order, and (4) whether they or any of them have any constitutional right to notice or hearing in advance of a state commission order permitting interim rate increases.

STATEMENT OF THE CASE.

The Jurisdictional Statement does not accurately state the case, either factually or legally.

The Pacific Telephone and Telegraph Company on August 7, 1957, filed an application with the Public Utilities Commission of California asking authorization to increase certain intrastate telephone rates. Among the proposed rate increases were changes in the charges for message unit and multiple message unit service in the Los Angeles Extended Area.[4] A formal notice was published in all major Los Angeles newspapers and altogether in 31 sep-

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[4]Message unit telephone service is a measured service wherein time and distance factors make up the number of "units" to be charged for a completed call. The changes proposed included both an increase in the message unit rate itself, and a change in the distance factor or "mileage steps," both effecting an increase in charges (Appx. B, p. 6).

The Los Angeles Extended Area is a large area embracing numerous telephone "exchanges," wherein interexchange telephone service is furnished on a "local" rather than a "long distance"

arate newspapers published in 27 separate cities in the Los Angeles Extended Area (Ans.Pac. 11-12). Notice of the filing of the application was given by letter to the appropriate officers of the State of California and of the counties and cities in which The Pacific Telephone and Telegraph Company provides telephone service (Ans.Pac. 11).

Hearings on the application commenced September 25, 1957 (Appx. B, p. 5). The Cities of Los Angeles and Long Beach appeared (Appx. B, pp. 19-20). The four telephone companies joining in this motion were parties to other proceedings which also involved the multiple message unit service in the Los Angeles Extended Area. These proceedings were consolidated with the rate application on September 27, 1957 (Appx. B, pp. 4-6). At the hearing on that day the four companies joined in a motion for an interim rate increase affecting the multiple message unit rate (Appx. B, p. 6; Appx. E, p. 62). Hearings continued on September 27, and October 3, 4 and 10, 1957 (Appx. B, p. 6; Appx. E, p. 62). On December 10, 1957, the Commission issued the order challenged here, authorizing in part the proposed interim rate increases (Appx. B, pp. 3-23). Attendance and participation of the Cities of Los Angeles and Long Beach at these hearings are undisputed (Appx. E, p. 62; Ans.Pac. 39-48).

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basis by means of a multiple message unit rate structure. The four telephone companies which join in this motion each furnish telephone service in a part of the Los Angeles Extended Area (Appx. B, p. 6). Telephone service is unrestrictedly interchanged between the customers and territories of the respective companies through physical interconnections of their lines.

A uniform message unit rate for service furnished by the four companies in the Los Angeles Extended Area prevails under order of the Commission (Decision No. 50260 (1954) 53 Cal. P.U.C. 342).

Petitions for rehearing, filed by the appellants here, were denied on January 7, 1958 (Appxs. E and F, pp. 57-66).

The Supreme Court of California denied review on May 21, 1958 (Appx. A).

Previously, on May 6, 1958, the Commission issued its final order in the consolidated proceeding (Decision No. 56652; 56 Cal.P.U.C. 277, 23 PUR 3d 209) which reaffirmed and made permanent the interim rates.

ARGUMENT.

I.

APPELLANTS HAVE NO STANDING TO URGE THEIR CLAIMS IN THIS COURT.

Appellants are (a) two California cities, claiming to act for themselves and "in effect in behalf of all of the subscribers within the Los Angeles area who would otherwise have been without representation" and (b) their city attorneys "as individual subscribers." The appellants as a group claim to appeal "in behalf of all telephone subscribers within the Los Angeles area."[5]

A. The cities.

1. The cities have no right which they may invoke under the Federal Constitution against the legislative action of their parent state, or its duly constituted agent, the Public Utilities Commission.

As to any purported violation of their constitutional rights, Los Angeles and Long Beach as municipal corporations have no privileges or immunities under the Fed-

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[5]All these quotations appear in the Jurisdictional Statement, p. 12.

eral Constitution which they may invoke in opposition to the will of their creator, the state.

Williams v. Mayor (1933) 289 U.S. 36, 40;

R.R.Comm'n v. Los Angeles R.Co. (1929) 280 U.S. 145, 156;

Risty v. Chicago, R.I. & Pac.Ry.Co. (1926) 270 U.S. 378, 390;

Trenton v. New Jersey (1923) 262 U.S. 182, 192;

Newark v. New Jersey (1923) 262 U.S. 192, 196;

Pawhuska v. Pawhuska Oil Co. (1919) 250 U.S. 394, 399;

Worcester v. Street Railway Co. (1905) 196 U.S. 539, 548-549.

This principle applies to legislative determinations of the state's duly constituted agent, the public utilities commission.

R.R.Comm'n v. Los Angeles R.Co., supra, 280 U.S. 145, 156;

Pawhuska v. Pawhuska Oil Co., supra, 250 U.S. 394, 399.

This court has repeatedly cited the *Pawhuska* and other cases referred to above in per curiam decisions as compelling the dismissal of appeals sought to be taken by municipal corporations to invalidate rate orders of state commissions. For example:

City of Winfield v. Court of Industrial Relations (1923) 263 U.S. 680;

Borough of Edgewood v. Wilkinsburg & East Pittsburgh Street Railway Company and Borough of Edgewood v. Public Service Commission of the Commonwealth of Pennsylvania (1922) 258 U.S. 604;

City of Sapulpa v. Oklahoma Natural Gas Company (1922) 258 U.S. 608;

People of the State of Michigan ex rel. Alex. J. Groesbeck, Attorney General v. Detroit United Railway (1921) 257 U.S. 609;

City of Chicago v. Chicago Railways Company (1921) 257 U.S. 617;

City of Hillsboro, Oregon v. Public Service Commission of Oregon (1921) 255 U.S. 562;

State of Missouri at the Relation of City of Sedalia v. Public Service Commission of Missouri (1920) 251 U.S. 547;

Kansas City v. Public Service Commission of Missouri (1919) 250 U.S. 652.

2. The cities have no standing to assert the constitutional claims of others.

As to any purported violation of constitutional rights of subscribers within cities, or elsewhere within the "Los Angeles area," municipal corporations, just as any other litigant, have no standing to champion the constitutional rights of others.

Lampasas v. Bell (1901) 180 U.S. 276, 283-284;

Tileston v. Ullman (1943) 318 U.S. 44, 46;

Premier-Pabst Co. v. Grosscup (1936) 298 U.S. 226, 227;

Cronin v. Adams (1904) 192 U.S. 108, 114.

The cities' suggestion that the subscribers within the Los Angeles area would have been without representation unless the cities appeared in their behalf (Jur.St. 12) is unsound. Aside from the widespread notice of rate increase applications and the liberal practice of the Com-

mission in allowing interested parties to appear,[6] under California law the Commission itself represents the public interest in the field of public utility regulation and is charged with the protection of that interest.[7]

Sale v. Railroad Commission (1940) 15 Cal.2d 612, 617-618, 104 P.2d 38, 41-42;

Hanlon v. Eshleman (1915) 169 Cal. 200, 202, 146 Pac. 656, 657;

Pacific Telephone Etc. Co. v. Eshleman (1913) 166 Cal. 640, 137 Pac. 1119.

This Court has recognized that state regulatory authority is responsible for safeguarding the public interest.

Smith v. Ill. Bell Tel. Co. (1926) 270 U.S. 587, 592;

New York City v. N.Y. Tel. Co. (1923) 261 U.S. 312, 316,

and, on the authority of the *Pawhuska* case, it has without any differentiation dismissed appeals by municipal corporations seeking to invalidate rate orders where representation of resident subscribers was asserted.

City of Winfield v. Court of Industrial Relations, supra, 263 U.S. 680;

City of Sapulpa v. Oklahoma Natural Gas Company, supra, 257 U.S. 617;

City of Chicago v. Chicago Railways Company, supra, 257 U.S. 617.

Appellants refer to a number of cases as illustrative of instances where municipalities have appeared as rep-

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[6]For newspaper publicity, see Ans.Pac. 11-12.
For appearances of interested parties in the proceeding below, see Appx. B, pp. 19-20.

[7]The Commission so determined in the present proceeding (Appx. E, p. 61).

resentatives of "customer interests" (Jur.St. 24, n. 19). But the fact of such appearances before federal and state regulatory bodies, or in proceedings to review their actions, does not, of course, negate the *Pawhuska* rule and confer standing in this Court to argue constitutional claims on behalf of others.

B. The city attorneys as individuals.

In an admitted effort to circumvent the decisions of this Court cited above (Jur.St. 12, n. 7) the two city attorneys added their names "as individual subscribers" to the petitions for rehearing which they filed in the Commission on behalf of their principals. This was their first appearance other than in their official capacity.

1. Not having established in the record any interest in their individual capacities as to which they now claim their constitutional rights have been infringed, the city attorneys have no standing to make such claim in this Court.

The city attorneys made no showing either by testimony, documentary evidence or affidavit that in their individual capacities they were in fact subscribers for telephone service from any of the four telephone companies which join in this motion; or, if they were such subscribers, what class, type or grade of service they used; or how their service was affected by the Commission order in question.

In the absence of a showing in the record of a constitutionally protected interest, the city attorneys have no standing to challenge in this Court the order of the Commission on the ground that it infringed an unproved interest.

> "It is the settled law of this court that one who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments *and showing* within the class as to whom the act just attacked is unconstitutional. He must *show* that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution" (emphasis added) (*Southern Railway Co. v. King* (1910) 217 U.S. 524, 534).

To the same effect is:

Standard Stock Food Co. v. Wright (1912) 225 U.S. 540, 550.

2. Under California law, the city attorneys as individuals had no standing to seek a writ of review, the denial of which is the subject of their present appeal. As to them, therefore, the judgment rests on an adequate nonfederal ground.

Under California law only a party who has duly applied to the Commission for a rehearing is given the right to seek a judicial review of the Commission's order by means of a petition for that purpose.[8] Under the same law the right to apply for a rehearing in the Commission is given only to (a) "any party to the action or proceeding" or (b) "any stockholder or bondholder or other party pecuniarily interested in the public utility affected."[9] The city attorneys in their individual capacities were not parties to the proceeding; admittedly (Jur.St. 12) they had entered no appearance in their individual capacities

[8]Public Utilities Code, secs. 1731 and 1756; Appx. G, pp. 76-77.
[9]Public Utilities Code, sec. 1731; Appx. G, p. 76.

until all the proceedings with respect to the interim rate increase order were completed and the order had been issued. They then added their names to the cities' petitions for rehearing, without any proof in the record of their interest in the matter.

Under the California statute noted above, one not previously a party to the proceeding in the Commission, and therefore not within the class authorized to apply for a rehearing, does not acquire the status of a party simply by filing an application for a rehearing. Nor did the city attorneys show, or make any effort to show, any stockholding, bondholding, or any other pecuniary interest in any of the four public utilities affected. Not having been in a position under California law to apply to the Commission for a rehearing, they had no standing to petition the Supreme Court of California for a writ of review.

Their standing before the Supreme Court of California was duly questioned before that court (Ans.Pac. 30-31, n. 9). Since that court's denial of a writ of review, without opinion, under California law is a determination on the merits of the legal and factual issues raised in the review proceedings,

Napa Valley Co. v. R. R. Comm. (1920) 251 U.S. 366, 372-373;

People v. Western Air Lines, Inc. (1954) 42 Cal.2d 621, 630-631, 268 P.2d 723, 728, appeal dismissed (1954) 348 U.S. 859;

Funeral Dir. Assn. v. Bd. of Funeral Dirs. (1943) 22 Cal.2d 104, 107-108, 136 P.2d 785, 787;

People v. Hadley (1924) 66 Cal.App. 370, 375, 226 Pac. 836, 839,

that point is res judicata against appellants, and the decision below in this particular rests upon an adequate non-federal ground.

Rogers v. Jones (1909) 214 U.S. 196, 204;
De Saussure v. Gaillard (1888) 127 U.S. 216, 232-234.

It is the rule of this Court that one not a party to proceedings below has no standing to appeal or petition for a writ of certiorari from the judgment therein:

Bayard v. Lombard, et al. (1850) 9 How. (50 U.S.) 530, 551;
Louisiana v. Jack (1917) 244 U.S. 397, 402;
Ex parte Leaf Tobacco Board of Trade (1911) 222 U.S. 578, 581;
Posner v. Anderson (1934) 293 U.S. 531.

3. The two city attorneys have no standing to urge the constitutional claims of other individuals.

Despite their unsupported assertions that they appeal "in behalf of all of the telephone subscribers within the Los Angeles area" (Jur.St. 12), the two city attorneys as individuals are not the champions of anyone's constitutional rights except their own (supra, p. 8).

II.

THE FINAL ORDER OF THE COMMISSION, DETERMINING THAT THE INTERIM RATE RELIEF WAS JUSTIFIED AND AFFIRMING AND MAKING PERMANENT THE RATE INCREASES FIXED THEREIN, RENDERS THE APPEAL MOOT.

The gist of appellants' claim is that lack of sufficient notice and full hearing before the interim rate increases

were ordered denied them adequate opportunity to contest the proposed rate increases. Inherent in their claim is the assumption that if they had had such opportunity, they could have succeeded in establishing to the Commission's satisfaction that the rates which the Commission subsequently ordered were unjust or unreasonable. However, after the hearings preceding the interim rate order, hearings in the matter continued for several months until a total of 32 days of public hearings had been held.[10] Here was ample opportunity for appellants to make further inquiry and offer any showing with respect to the rates in question, had they seen fit to do so.

Ultimately, on May 6, 1958, the Commission issued its final order (*Pac. Tel. & Tel. Co.*, Decision No. 56652 (1958) 56 Cal. P.U.C. 277; 23 PUR 3d 209). In this final decision, the Commission summarized the additional evidence upon the subject of the message unit rates which had been adduced during the days of hearing subsequent to the issuance of the interim order, and went on to state (56 Cal. P.U.C. 292; 23 PUR 3d 225):

> "The additional evidence leads the Commission to the further conclusion that Decision No. 55936, which authorized rate changes on an interim basis, should now be made permanent. The Commission finds, therefore, that the rate relief granted under Decision No. 55936 was justified and said decision as amended by Decision No. 56048 with respect to its effective date is hereby affirmed and made permanent."

The result is that upon completion of all hearings, including all showings that were offered and received and

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[10] *Pac. Tel. & Tel. Co.*, Decision No. 56652 (1958) 56 Cal.P.U.C. 277, 279; 23 PUR 3d 209, 213 (the final decision).

all cross-examination, the Commission ended with the determination that the rates in question were (and had been from the time fixed in the interim order) just and reasonable. This disposes of any intimation by appellants that they suffered any injury as a result of the interim rate order.

In short, even if both the judgment appealed from and the Commission's interim rate order were set aside, the final order of the Commission reaffirming the rate increases embodied in the interim order still confronts the appellants. The final order renders moot the present challenge of the interim order. The case is like those in which an order denying a preliminary injunction has become merged in a final judgment denying injunction; in such cases this Court has dismissed appeals from the orders denying the temporary injunctions.

Champlin Rfg. Co. v. Commission (1932) 286 U.S. 210, 212, 224;

Pacific Tel. Co. v. Kuykendall (1924) 265 U.S. 196, 205-206;

Shaffer v. Carter (1920) 252 U.S. 37, 44.

III.

THE APPELLANT CITIES ACTUALLY APPEARED IN THE PROCEEDINGS BEFORE THE COMMISSION WHICH CULMINATED IN THE CHALLENGED ORDER, AND WERE GIVEN FULL OPPORTUNITY TO AND DID PARTICIPATE IN THE VARIOUS PHASES OF THESE PROCEEDINGS, INCLUDING CROSS-EXAMINATION AND ARGUMENT. THERE IS NO FACTUAL BASIS FOR THEIR CLAIM THAT THEY WERE DENIED ADEQUATE NOTICE AND HEARING.

In point of fact, appellants' claims that the Commission denied them adequate notice and hearing are specious. As indicated above, the two city attorneys did not see fit to appear in their individual capacities until after the interim order had issued (and then nominally joined in petitions for rehearing for the avowed purpose of circumventing the "*Pawhuska* rule," supra), although they had previously appeared on behalf of their municipal principals and obviously knew all about the hearings. The two cities were represented throughout the proceedings (Appx. B, pp. 19-20, Appx. E, p. 62).

A. Appellants have produced no record to contradict the Commission's determination that due notice and hearing were accorded.

The Commission determined that appropriate notice and a full hearing had been accorded, in its Decision No. 56048 denying the petition of the City of Los Angeles and Roger Arnebergh for a rehearing (Appx. E). The Commission said (Appx. E, pp. 60-62):

> "• • • the burden of the petition is that due process of law was denied petitioners, lawful notice of the proposed interim increase of rates was not given • • •.
>
> The record in these proceedings and the law constitute a complete refutation of petitioners' unsupported allegations.
>
> • • • • •

> The repeated assertion by petitioners in their petition for rehearing that a full hearing was not accorded the parties on the motion by the telephone companies for interim relief is incorrect and the record irrefutably so shows. Hearings on the two complaints were held on September 19, 20, and 26, 1957. * * * On the third day of hearing in the application proceeding (September 27, 1957) * * * the four telephone utilities made a motion for interim relief, and hearings thereon were held on September 27, October 3, 4 and 10, 1957. Petitioner City of Los Angeles appeared at all of the above hearings.
>
> After the telephone companies had presented their evidence in support of such motion and the protesting and interested parties including the City of Los Angeles,[11] had cross-examined the witnesses for the telephone companies, the presiding officer inquired of these parties if they had any evidence to offer in connection with the motion for interim relief and they answered in the negative. No suggestion or request was made by any of these parties for a continuance to enable said parties to present evidence. Also, the motion for interim rate relief was argued by the parties, including the City of Los Angeles and other protesting and interested parties. In these circumstances, the repeated insinuation of petitioners that the interested parties were denied an opportunity to be heard and that a full hearing was not had on the motion for interim relief is disingenuous, to say the very least."

Appellants' conduct parallels the situation in *Market Street R. Co. v. Comm'n* (1945) 324 U.S. 548, where this Court said (p. 559):

> "But even if a more convincing showing were made that the Company had relevant evidence to be heard,

[11]These interested parties also included the City of Long Beach, appearing by Walhfred Jacobson (Appx. B, p. 20).

> we find no adequate excuse for the failure to offer it in the proceeding. No offer was rejected, no request for time to obtain such evidence was denied. A misapprehension by a litigant of the steps which its best interests require during a trial may be appealing grounds for a plea to the discretion of the hearing tribunal for another chance, but it is not grounds for our interference as a denial of constitutional rights."

In the record on this appeal, the above determination by the Commission is not contradicted by any showing to the contrary. Appellants have not supported their naked assertions as to lack of due notice and hearing by bringing up the record before the Commission to show, if they could, that the Commission's determination was erroneous. In such a situation this Court will accept the findings of the Commission as correct.[12]

Miss. Valley Barge Co. v. U.S. (1934) 292 U.S. 282, 286;

Edward Hines Trustees v. U.S. (1923) 263 U.S. 143, 148;

Nashville Ry. v. Tennessee (1923) 262 U.S. 318, 324.

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[12]There are in the record before this Court several statements paraphrasing the record before the Commission and also verbatim excerpts from that record, which show beyond question that the cities were given every opportunity to cross-examine witnesses and make any affirmative showing that they saw fit. These statements and excerpts appear in the answer of The Pacific Telephone and Telegraph Company, et al., to petition for writ of review (supra, p. 2, n. 2) pp. 39-48.

While the appellants say that the "factual assertions in denial or avoidance" in the answers to the appellants' petition for writ of review were "traversed by the appellants' reply" (Jur.St. 8), their reply failed either to challenge the accuracy of any of the excerpts from the record or to produce any contradictory evidence or record references whatever.

B. The appearances of appellant cities by the appellant city attorneys in the Commission proceedings waived any objection to the adequacy of notice.

The participation of the appellant cities by their city attorneys in the Commission proceedings has already been noted. It is fundamental that the actual appearance of a party at a proceeding waives any objection to the adequacy of notice of such proceeding.

United States v. Miller (1943) 317 U.S. 369, 382;
Doty v. Love (1935) 295 U.S. 64, 74;
Detroit &c. Ry. v. Osborn (1903) 189 U.S. 383, 391.

IV.

IN ANY EVENT THE APPELLANTS HAVE NO CONSTITUTIONAL RIGHT TO NOTICE AND HEARING, BEFORE THE COMMISSION WAS ENTITLED TO MAKE ITS ORDER INCREASING TELEPHONE RATES ON AN INTERIM BASIS.

Even if the appellants were right in their contentions that they were denied adequate notice and hearing before the Commission's interim rate order issued, that fact would not avail them a remedy here. They have no constitutionally protected right to prior notice and hearing because (a) the Commission itself represents the public interest in rate-making proceedings, (b) the state law affords utility customers adequate protection against arbitrary rate-fixing action by giving them a right, under section 1702 and section 1704 of the California Public Utilities Code,[13] to challenge before the Commission any

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[13] "1702. Complaint may be made by the commission of its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or

"charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law * * *" (Cal.Pub.U.Code, sec. 1702), and (c) as subscribers, appellants have no such property interest in the rates fixed for public service corporations as to entitle them or each customer or potential customer to notice and hearing before the Commission can increase a particular rate.

This Court recognized all three of these grounds in *United States v. Merchants &c. Ass'n.* (1916) 242 U.S. 178, a case arising under the Interstate Commerce Act. In disposing of the contention of certain shippers that they had been denied their right to a hearing in the rate-making proceeding, this Court declared (p. 188):

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organization, or any body politic or municipal corporation, by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission. No complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, or telephone corporation, unless it is signed by the mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the city or city and county within which the alleged violation occurred, or by not less than 25 actual or prospective consumers or purchasers of such gas, electricity, water, or telephone service" (Appx. G, p. 74).

"1704. Upon the filing of a complaint, the commission shall cause a copy thereof to be served upon the corporation or person complained of. Service in all hearings, investigations, and proceedings pending before the commission may be made upon any person upon whom a summons may be served in accordance with the provisions of the Code of Civil Procedure and may be made personally or by mailing in a sealed envelope, registered, with postage prepaid. The commission shall fix the time when and place where a hearing will be had upon the complaint and shall serve notice thereof, not less than 10 days before the time set for such hearing, unless the commission finds that public necessity requires that such hearing be held at an earlier date."

"The carrier is the only necessary party to the proceeding under §4. The Commission represents the public. While it is proper and customary for communities or shippers interested to participate in hearings held, there is no provision for notice to them. They are not bound by the order entered; at least in the absence of such participation. And if the rates made by tariffs filed under the authority granted seem to them unreasonable or unjustly discriminatory, §§ 13 and 15 afford ample remedy. Respondents contend that, after the amended order was entered and the tariffs filed, they did apply to the Commission for relief 'but were denied the right of a hearing' and that 'their protest and demand were ignored and denied.' What they did was to petition for a 'rehearing' in the proceedings under the Fourth Section, to which they now say they were not parties, instead of applying for redress under § 13, as they had a legal right to do. They mistook their remedy. To permit communities or shippers to seek redress for such grievances in the courts would invade and often nullify the administrative authority vested in the Commission; and, as this case illustrates, the attempt of the court to remove some alleged unjust discrimination might result in creating infinitely more. The decree of the District Court cancels the amended order and the tariff only so far as it concerns the four complaining cities and thereby discriminates perhaps most unjustly in their favor as against the other 181 interior cities."[14]

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[14]In accord with *United States v. Merchants &c. Ass'n.*, state court cases hold that notice to and a hearing for consumers are not constitutional prerequisites to the issuance of rate orders. See:

State v. Rawlings (1951) 229 Ind. 552, 99 N.E.2d 597, 602;
Gateway City Transfer Co. v. Public Service Commission (1944) 245 Wis. 304, 14 N.W.2d 6, 7-8;

The same situation prevails in California. It has already been pointed out that (1) the California Public Utilities Commission is expressly charged with the representation of the public interest (supra, p. 9) and (2) utility customers have adequate right to challenge any rate and have a hearing thereon, afer the rate has been fixed, under sections 1702 and 1704 of the California Public Utilities Code (supra, p. 19).

Moreover, it is settled that the subscribers' right to service exists only because of statute and is not such a property right as may form the basis of a claim of confiscation. A leading case is the decision of the United States Circuit Court of Appeals for the Second Circuit:

> *United States Light & Heat Corp. v. Niagara Falls G. & E. L. Co.* (2 Cir. 1931) 47 F.2d 567, 570, certiorari denied (1931) 283 U.S. 864.

In accord are numerous state court cases.[15]

Lenihan v. Tri-State Telephone & Telegraph Co. (1940) 208 Minn. 172, 293 N.W. 601, 605, certiorari denied (1940) 311 U.S. 711;

Consumers' Gas Co. v. Corporation Commission (1923) 95 Okl. 57, 219 Pac. 126, 129;

City of Bartlesville v. Corporation Commission (1921) 82 Okl. 160, 199 Pac. 396, 398;

City of Atlanta v. Georgia Ry. & Power Co. (1919) 149 Ga. 411, 100 S.E. 442, 444-445;

Union Dry Goods Co. v. Georgia Public Service Corp. (1916) 145 Ga. 658, 89 S.E. 779, affirmed (1919) 248 U.S. 372.

[15]*City of Birmingham v. Southern Bell Tel. & Tel. Co.* (1937) 234 Ala. 526, 176 So. 301, 306-307;

City of New Haven v. New Haven Water Co. (1946) 132 Conn. 496, 45 Atl.2d 831, 838-839;

State v. Mountain States Tel. & Tel. Co. (1950) 54 N.M. 315, 224 P.2d 155, 161-166;

Prior notice and hearing to all utility customers before a public utilities commission could raise a rate, even on an interim basis, would be intolerable from the practical standpoint. If the Commission were required to give notices and hold hearings before it could increase any of the thousands of separate utility rates on file in California, upon pain of having the amended rates set aside as unconstitutional, the legislative function of rate making would be clogged to the point of paralysis.

Neither of the decisions of this Court with which appellants say the judgment conflicts—*Hollis v. Kutz* (1921) 255 U.S. 452; *Wichita R. R. v. Pub. Util. Comm.* (1922) 260 U.S. 48 (Jur.St. 2, 19, 25-26)—furnishes any support for their contention. In the *Hollis* case the Court interpreted a federal statute as permitting gas consumers to challenge a rate order of the Public Utilities Commission of the District of Columbia in an equity suit without having appeared in the commission hearing or having asked the commission to review its decision; and further held that "the plaintiffs have no right to require equality [of rates] with the Government and they have no other ground upon which to found their supposed right" (255 U.S. 455). Nothing in the decision suggests that the

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Boston Real Estate Bd. v. Department of Public Util. (1956) 334 Mass. 477, 136 N.E.2d 243, 251-252;

State v. Municipal Corporations of Scotland Neck (1955) 243 N.C. 193, 90 S.E.2d 519, 528;

Ten Ten Lincoln Place v. Consolidated Edison Co. (1947) 190 Misc. 174, 73 N.Y.S.2d 2, 5-6, affirmed (1948) 273 App.Div. 903, 77 N.Y.S.2d 168, leave to appeal denied (1948) 298 N.Y. 937, 80 N.E.2d 547;

Childs v. Brooklyn Edison Co. of N.Y. (Supreme Ct., Kings Co. Pt. I, 1951) 105 N.Y.S.2d 503, 508-509;

McCormick v. Westchester Lighting Co. (1931) 141 Misc. 261, 252 N.Y.S. 454, 458.

consumers had a right, protected by the Federal Constitution, to a hearing before the commission prior to an order allowing increased rates.

The *Wichita* decision struck down an order of the Kansas Public Utilities Commission increasing utility rates fixed by private contract prior to the commission's inception, on the ground of a Kansas statutory requirement that an express finding of unreasonableness by the commission was indispensable and had not been made (260 U.S. 59). This determination obviated any decision upon the plaintiff's claim that the commission order violated its constitutional rights.[16] The other holding in the case, that the plaintiff was entitled, in its action to test its claim that the order of the commission had infringed its constitutional rights, to an opportunity to maintain by evidence and argument before the district court the issue as to due process of law and equal protection of the law (260 U.S. 55), has no relation to the issue here. Under California law, opportunity to maintain such an issue by evidence and argument is afforded by Public Utilities Code section 1702, supra.[17]

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[16]Any suggestion that even a consumer *with a contract* is constitutionally entitled to notice and hearing before the Commission, on the propriety of rates to be fixed under a regulatory statute, is answered by this Court's decision in *Midland Co. v. K. C. Power Co.* (1937) 300 U.S. 109, 114. As this Court said in *United Gas Co. v. Mobile Gas Corp.* (1956) 350 U.S. 332, 345-346:

> "In *Midland* • • • the Court held only that a statute interpreted by the state court as authorizing unilateral contract changes by a public utility was not unconstitutional. On the other hand, in *Wichita* this Court interpreted a Kansas statute, not yet fully construed by the state court, as not giving such a power to a public utility • • •."

[17]In a footnote (Jur.St. 19) appellants refer to *Panama Refining Co. v. Ryan* (1935) 293 U.S. 388 and *Mahler v. Eby*

Appellants cite a number of cases as conflicting "in principle" with the judgment below (Jur.St. 26). With two exceptions[18] these cases simply restate the established doctrine that the property of a public service corporation, dedicated to public use, is protected from confiscation by the requirements of due process.

(1924) 264 U.S. 32 as citing the *Wichita* case. They have no relevance here. Their holdings that a federal agency must make findings in support of its orders were based on the constitutional framework of the federal government in order to prevent an unconstitutional delegation of congressional legislative power to administrative agencies. The case here involves the framework of state government, with no similar inhibition (Cal. Const., Art. XII, secs. 22 and 23). The fact that the California legislature, by statute, has imposed a requirement of Commission findings in certain instances (e.g., Public Utilities Code section 454; Appx. G, p. 70) does not make the requirement a constitutional one.

[18] *In re Oliver* (1948) 333 U.S. 257 is not even in the utility field. It involved the requirements of procedural due process where a suspected criminal was imprisoned without a hearing. The case has no bearing here.

Hollis v. Kutz (1921) 225 U.S. 452 is discussed supra, p. 23.

CONCLUSION.

For the foregoing reasons, we respectfully submit that the appeal should be dismissed.

Dated, San Francisco, California,
February 17, 1959.

Respectfully submitted,

ARTHUR T. GEORGE,
FRANCIS N. MARSHALL,
Attorneys for The Pacific Telephone and Telegraph Company, Appellee.

JOHN ROBERT JONES,
Attorney for General Telephone Company of California, Appellee.

ALVIN H. PELAVIN,
Attorney for California Water & Telephone Company, Appellee.

WARREN A. PALMER,
Attorney for Sunland-Tujunga Telephone Company, Appellee.

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Supreme Court of the United States

OCTOBER TERM, 1958

No. 656

THE CITY OF LOS ANGELES, A MUNICIPAL CORPORATION, THE CITY OF LONG BEACH, A MUNICIPAL CORPORATION, ROGER ARNEBERGH AND WAHLFRED JACOBSON,

Appellants,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, AND C. LYN FOX, PETER E. MITCHELL, MATTHEW J. DOOLEY, THEODORE H. JENNER AND EVERETT C. McKEAGE AS MEMBERS OF AND CONSTITUTING THE SAID PUBLIC UTILITIES COMMISSION,

Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF AMICI CURIAE OF THE MEMBER MUNICIPALITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

JOHN C. BANKS,
City and County of Denver, Denver, Colorado.

CHARLES H. TENNEY,
Corporation Counsel, New York, New York.

WALTER J. MATTISON,
City Attorney, Milwaukee, Wisconsin.

JOHN C. MELANIPHY,
Corporation Counsel, Chicago, Ill.

J. ELLIOTT DRINARD,
City Attorney, Richmond, Virginia.

MARSHALL F. HURLEY,
City Attorney, St. Paul, Minnesota.

RALPH S. LOCHER,
Director of Law, Cleveland, Ohio.

CLAUDE V. JONES,
City Attorney, Durham, North Carolina.

CHARLES S. RHYNE,
J. PARKER CONNOR,
400 Hill Building
Washington 6, D. C.

February 20, 1959.

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IN THE

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OCTOBER TERM, 1958

No. 656

THE CITY OF LOS ANGELES, a Municipal Corporation, THE CITY OF LONG BEACH, a Municipal Corporation, ROGER ARNEBERGH AND WAHLFRED JACOBSON,

Appellants,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, AND C. LYN FOX, PETER E. MITCHELL, MATTHEW J. DOOLEY, THEODORE H. JENNER AND EVERETT C. McKEAGE as members of and Constituting the said Public Utilities Commission,

Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF AMICI CURIAE OF THE MEMBER MUNICIPALITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

Interest of Amici Curiae

The National Institute of Municipal Law Officers (NIMLO) is an organization of more than one thousand municipalities located in each of the 49 states, the District of

Columbia, and in the territories of Hawaii and Puerto Rico. Each member city acts through its chief legal officer, known variously as Corporation Counsel, City Attorney, City Solicitor, Director of Law, etc.

This Brief is filed pursuant to Rule 42(4) of this Court. The members of NIMLO are political subdivisions of states and this Brief is sponsored by their authorized law officers.

The principles involved in the case at bar vitally affect not only the City of Los Angeles and the City of Long Beach, but also all other municipalities and their residents in the United States. Should the action of the Public Utilities Commission of the State of California be upheld, then all regulatory commissions in the country might construe said action as a license to engage in *ex parte* grants of rate increases sought by utilities without hearing, notice or opportunity for participation, all to the great detriment of the consuming public. For this reason, the municipalities represented by NIMLO file this Brief with the Court in support of the Court's taking jurisdiction of the case and reversing the finding below.

Summary of Argument

The grant to a regulated utility of an *ex parte* rate increase without notice, opportunity to be heard or opportunity afforded for cross examination to the consumers who are required to pay such increase does not comport with the requirements of due process as set forth in the Fourteenth Amendment.

If the procedure employed by the Commission in the instant case is permitted to stand, every commission and regulatory body in the United States will be granted carte blanche to grant increases in rates without affording due process to consumers. The result could be that millions

of dollars will be paid by consumers with the possibility of no refund being made by the company in the event that the commission or a court ultimately finds the increase granted to have unwarranted. This being the case, the question involved in the instant case has a vital effect upon every city and upon every public utility customer in the United States.

ARGUMENT

I. The Fourteenth Amendment Requires a Hearing Upon Proposed Rate Increases

As set forth by the City of Los Angeles and the City of Long Beach in the Jurisdictional Statement, the Public Utilities Commission of the State of California granted an interim rate increase on an *ex parte* basis to the regulated telephone utilities rendering service to those cities. This increase was in the amount of approximately $1,250,000 per month which amount was required to be paid by the subscribers in the cities. In total, $5,000,000 was paid by the subscribers, without any due process afforded said subscribers, since this interim *ex parte* increase was in effect for a period of four months.

This increase was granted in a purely arbitrary manner before there had been a full hearing. Further, and more importantly, there were no conditions attached by the Commission to the grant of this "interim" increase, and no requirements for a refund by the company to the consumers in the event the Commission should ultimately have found that the increase granted was not just and reasonable as a result of a failure by the Company to prove its need for an increase. This procedure certainly does not fall within the due process requirements of the Fourteenth Amendment.

It is an unassailable proposition of law that in utility

regulations a company is entitled to due process in a rate proceeding and that it must receive by means of rates all expenses incurred, a fair return upon the properties which have been devoted to the public interest and so forth.[1] Were the Commission to order a decrease in rates, *ex parte* on the motion of a consumer, there can be no doubt that such action would be completely devoid of due process—from the company standpoint. It is equally true, however, that the individuals who are to pay the rates are also entitled to due process. The rates ultimately shouldered by consumers cannot be arrived at by a commission on an *ex parte* basis, unsubstantiated by testimony which is subjected to cross examination. This Court has ruled over three decades ago that consumers are entitled to protection against rates being imposed upon them without due process of law. (See *Wichita Railroad & Light Co.* v. *Public Utilities Commission*, 260 U.S. 48). Therefore, the action of the Public Utilities Commission in granting an *ex parte* rate increase with no conditions for refunds in the event said increase should be ultimately denied is a patently incorrect procedure which requires this Court to take jurisdiction and reverse the finding below.

II. The Issues Involved Herein Are of Tremendous National Import

Should the action of the California Commission not be reversed, the result will be to leave standing a precedent which could adversely affect every community and resident in the United States. With the exception of only a few, every state has utility regulation by either commissions or municipalities (in the case of home rule cities chartered under certain state statutes). If the procedure employed

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[1] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591.

in the instant case should be employed in other jurisdictions, the millions of dollars which consumers might be required to pay, with no due process granted them whatever, is staggering. It strains the imagination to find a clearer example of deprivation of property without due process than the one involved herein. These residents and consumers, who must rely upon a regulated utility for heat, light, telephone service and so forth should not be placed at its mercy as a result of an *ex parte* proceeding wherein they are not afforded an opportunity for adequate representation in order to insure that any increase which is sought is a valid and deserved one. It would be an impossible task to attempt a calculation of the number of increases, sought throughout the country by utilities before every village, town, city or state regulatory body. Many are not even reported and the ones which are are numerous. Should due process be denied in these proceedings, chaos would certainly result. Thus, the import of this case is one which can have far-reaching and oppressive effects upon the consumers and residents of the entire nation.

The fact that the Commission ultimately validated the increase which was granted *ex parte* is of no moment to this proceeding. The question involved remains the same. Had the Commission found at a later date that all or any part of this increase should not have been granted the consumers would be left in the untenable position of either permitting the company to retain the monies which the consumers had been required to pay or in the burdensome position of instituting some action, court or othewise, requiring the company to disgorge these monies. Such action was not needed in this instance but the principle of an *ex parte* increase without due process remains—and said principle should not be permitted to stand. It is a principle which is alien to every concept of due process in our jurisprudence

and if not reversed, every consumer in the United States faces the possibility that the regulatory body in his state can with impunity grant an increase in rates to a utility, with no notice, no hearing, no presentation of testimony, no cross examination and with no regard whatever for the rights of consumers. Such a thing is not in keeping with the pronouncement of this Court in the *Wichita* case and must be struck down.

Conclusion

The action of the Public Utilities Commission of California results in a deprivation of consumers properties without due process of law. The federal question is substantial and vitally affects every person in the entire United States. This Court should take jurisdiction and reverse the finding below.

Respectfully submitted,

JOHN C. BANKS,
City and County of Denver,
Denver, Colorado.

J. ELLIOTT DRINARD,
City Attorney,
Richmond, Virginia.

CHARLES H. TENNEY,
Corporation Counsel,
New York, New York.

MARSHALL F. HURLEY,
City Attorney,
St. Paul, Minnesota.

WALTER J. MATTISON,
City Attorney,
Milwaukee, Wisconsin.

RALPH S. LOCHER,
Director of Law,
Cleveland, Ohio.

JOHN C. MELANIPHY,
Corporation Counsel,
Chicago, Illinois.

CLAUDE V. JONES,
City Attorney,
Durham, North Carolina.

CHARLES S. RHYNE,
J. PARKER CONNOR,
400 Hill Building,
Washington 6, D.C.

Certificate of Service

We, Charles S. Rhyne and J. Parker Connor, attorneys for amici curiae, and members of the bar of the Supreme Court of the United States, do hereby certify that we have served upon the counsel of record for each other party, a copy of the foregoing brief amici curiae in support of the appeal from the Supreme Court of the State of California by depositing true and correct copies thereof in the United States mail, first class postage prepaid, on February 20, 1959 addressed as follows:

Pillsbury, Madison & Sutro
225 Bush Street
San Francisco 4, California

Arthur T. George, Esquire
140 New Montgomery Street
San Francisco 5, California

Francis N. Marshall, Esquire
G. H. Eckhardt, Jr., Esquire
Alexander R. Imlay, Esquire
225 Bush Street
San Francisco 4, California
Attorneys for Pacific Telephone and Telegraph Company

John Robert Jones, Esquire
Beacon Building
50 W. Gay Street
Columbus 15, Ohio
Attorney for General Telephone of California

Everett C. McKeage, Esquire
Chief Counsel
Roderick B. Cassidy
Assistant Chief Counsel
514 State Building
San Francisco 2, California
Attorneys for Public Utilities Commission of California

Albert M. Hart, Esquire
P. O. Box 889
Santa Monica, California
Attorneys for Gen. Telephone phone Company of California

Bacigalupi, Elkus & Salinger
Claude N. Rosenberg, Esquire
William G. Fleckles, Esquire
300 Montgomery Street
San Francisco 4, California
Attorneys for California Water and Telephone Company

Orrick, Dahlquist, Herrington
& Sutcliffe
Warren A. Palmer, Esquire
405 Montgomery Street
San Francisco 4, California
Attorneys for Sunland Tujunga Telephone Company

Stanley Mosk, Esquire
Attorney General of California
William M. Bennett
Deputy Attorney General
600 State Building
San Francisco 2, California
Attorneys for State of California, amicus curiae in support of appellants

CHARLES S. RHYNE,
J. PARKER CONNOR,
Attorneys for amici curiae.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 656

THE CITY OF LOS ANGELES, a municipal corporation, the CITY OF LONG BEACH, a municipal corporation, ROGER ARNEBERGH and WALHFRED JACOBSON,

Appellants,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and C. LYN FOX, PETER E. MITCHELL, MATTHEW J. DOOLEY, THEODORE H. JENNER and EVERETT C. McKEAGE, as members of and constituting the said Public Utilities Commission,

Appellees.

On Appeal From the Supreme Court of the State of California.

BRIEF IN OPPOSITION TO THE APPELLEES' MOTIONS TO DISMISS.

The appellees' motions to dismiss this appeal are essentially briefs on the merits, although this Court does not yet have the printed record before it. Primarily, they attempt to persuade the Court *at this juncture* that the judgment below was right upon the asserted facts outlined in them.

But even with that approach the appellees apparently do not really hope to persuade this Court at this stage to overrule *Hollis* and *Wichita* (*Hollis v. Kutz* (1921), 255 U. S. 452, 65 L. ed. 727, 41 S. Ct. 371, and *Wichita Railroad & Light Co. v. Public Utilities Commission* (1922), 260 U. S. 48, 67 L. ed. 124, 43 S. Ct. 51), for their principal reliance is upon pleas in avoidance, based upon factual suggestions which might be misleading.

This proposition inescapably remains:

Any order by this Court dismissing the appeal would be construed by the Commission and the telephone companies, and by other commissions and other regulated public utility corporations throughout the United States, as a determination by this Court that the Fourteenth Amendment offers full protection to regulated public utility corporations, but denies any protection whatever to utility customers.

Or to put it another way: that public utility customers are wholly subject to the most arbitrary state action that state administrative boards and state courts may wish to take or sustain, without heed to the Constitution of the United States and without fear of hindrance by any Court of the United States.

It is unfortunate indeed, that a constitutional issue of this magnitude is sought to be avoided by every quibble and cavil that could possibly be urged, for even though the appellees do finally urge that the Fourteenth Amendment does not protect public utility customers, and assert that its protection in state administrative rate proceedings extends only to utility corporations (Com.'s motion, Point II, esp. pp. 11-14, and Co's. motion, Point IV, pp. 19-25), they preface that basic denial with nearly every imaginable dilatory plea.

However, none of the appellees raises any real question as to this Court's jurisdiction, nor are there basically any contentions in their motions that the ultimate question presented has been directly determined by this Court adversely to the appellants' submission, that this Court has ever overruled or ever distinguished its essential holdings in *Hollis* or in *Wichita,* or that the question raised by the appeal is otherwise unsubstantial.

Least of all is there any claim by the appellees that the basic question presented is so unimportant that its determination does not justify its consideration by this Court at length, upon a printed record, after briefs on the merits have been filed, and after oral argument has been received.

In this context, the appellees' contentions on that basic question will be considered first in the argument of this brief. This, however, as well as the subsequent discussion of the appellees' dilatory pleas will involve some additional consideration of the procedural facts, in order that the appellees' assertions may not be misleading.

The following enlarged statement of the proceedings cannot be avoided under these circumstances. Nevertheless, what is now set forth was indicated in the appellants' jurisdictional statement, and as appears from the references given, all of it was shown to the Court below, except for the matter which is stated parenthetically.

Enlarged Statement of the Proceedings.

The four appellee telephone companies are the Pacific Telephone and Telegraph Company (Pacific), General Telephone Company of California (General), California Water & Telephone Company (California Telephone), and Sunland-Tujunga Telephone Company (Sunland).

Telephone companies conducting an intrastate business in California have historically filed with the appellee California Public Utilities Commission (the Commission) formal written applications for authorization, when they have proposed general increases in charges to their customers (Pet. pp. 3, 19, 20, 41, 53-55). The Commission has required extensive notice of such an application to be given (Reply, p. 2).

Soon thereafter the Commission has set an initial hearing, and notice thereof has been widely given by mail and otherwise by the Commission itself (Reply, p. 41).

(Typically the notice mailed by the Commission has been accompanied by a statement that the applicant's exhibits and affirmative testimony will be received at the initial hearing and that dates for subsequent sessions will then be fixed. This makes it clear that other parties will not be expected then to undertake any extended cross-examination or to prepare their direct evidence in opposition to the application by that time.)

As so fixed, the next session is usually some months in the future. This has permitted affected cities, other customer representatives, and the Commission staff, during the time intervening, to prepare for cross-examination of the applicant's witnesses and to prepare exhibits and testimony in their own behalf (Reply, pp. 52-53). (Generally the length of such adjournment has been fixed by the presiding commissioner according to representations by the Commission's staff and by cities and other parties as to the time which they will require for these purposes.)

Persons, firms, associations and private and public corporations appearing in such proceedings appear as parties and are referred to as parties. The hearings are conducted like judicial trials or hearings. Witnesses are sworn and are formally examined and cross-examined. Exhibits are marked for identification and afterward offered in evidence upon testimony explaining them. Objections are made to questions and to offers of evidence and are argued and formally ruled upon. Motions like those in judicial trials are made, argued, submitted and decided by the presiding commissioner, or upon his reference, by the Commission itself (Pet., Appx., pp. 1-11, 14).

All of this, including the form and contents of the applications and the conduct of the proceedings normally conforms to the applicable provisions of the California Public Utilities Code (see Jurisdictional Statement, Appendix (G), pp. 69-79, incl., and esp. Secs. 310, 454, 728, 729, 1701 and 1706), to the Commission's General Orders and to the Commission's promulgated Rules of Procedure (Pet., pp. 53-55).

This established procedure was followed upon Pacific's application, involved here, No. 39309, for certain increases in its intrastate rates throughout its system in California. The application was filed on August 7, 1957, and on September 6, 1957, the Commission issued its notice of a hearing in San Francisco thereupon on September 25, 1957 (Pet., p. 20). As stated in the appellees' motions, extensive notice of that hearing including notice to the appellant City of Los Angeles and the appellant Roger Arnebergh, was given by the Commission. It should be emphasized however, that no notice was given to the appellant City of Long Beach or to the appellant Walhfred Jacobson, presumably because they are directly served by General, and not by Pacific.

The formal notice of this initial hearing which was mailed to Los Angeles and Arnebergh, and to some others within Pacific's service areas, was accompanied by a letter from the Commission which made it clear that the initial hearing would be for the reception of the applicant's primary evidence, for limited further inquiry if time should permit, and for the scheduling of hearings to be held some months later. *No indication was given that any proposal for interim relief would be made or entertained* (Pet., p. 20).

As stated by the Commission the hearing upon Pacific's application commenced as scheduled on September 25, 1957, and a total of 32 days of hearings and argument were held at intervals thereafter until the reception of evidence was finally concluded on March 6, 1958. The dates which are critical here, however, are September 25 and 26, 1957, when the hearings and argument upon Pacific's application were proceeding consistently with the Commission's letter of advice, September 27, when the telephone companies made their motion, without prior notice, for an "interim" order authorizing increases in charges by all of them, October 3 and 4, 1957, when "hearings" and argument upon that motion were conducted before the Commission, purportedly during the course of hearings upon Pacific's application and upon two conjoined complaint cases, and October 10, 1957, when the motion for "interim" relief was taken under submission by the Commission (Pet., pp. 21-27).

(The transcript of the hearings conducted on those six days extends over 1055 pages: the transcript of the hearings on the other twenty-six days until Pacific's application was finally submitted for decision occupies 3,937 pages.)

It should be emphasized that the motion for interim relief proposed general increases in certain rates charged by General, California Telephone and Sunland, as well as increases in certain rates charged by Pacific, although rate increase applications by those three companies were not before the Commission when the motion for interim relief was entertained or when it was submitted for decision (Pet., pp. 22-23).

California Telephone had, indeed, on December 21, 1956, filed an application, No. 38685, for a general increase in its rates, and some hearings thereon had been

had, but that application was not before the Commission in connection with the motion for interim relief (Pet., pp. 19-20). General did not even have an application on file for any increase in its charges when the motion for interim relief was made. It did get such an application on file on October 10, 1957, the day the motion for interim relief was taken under submission, but such application was not then before the Commission for hearing or decision (Pet., p. 40; Reply, p. 2). The first hearing had thereon was several months later, on January 6, 1958 (Pet., p. 40).

Sunland did not get any application on file until long after the Commission had decided the motion for interim relief by its Decision No. 55936 on December 10, 1957 (Reply, p. 2).

The two complaint cases (Case No. 5974 and Case No. 5983) which were conjoined for hearing with Pacific's application, by an order summarily made on September 27, 1957, were not applications for authority to increase any charges to customers, but were instead simply complaints, by California Telephone in one case and by Pacific in the other case, in which action by the Commission was asked affecting the division of certain interchanged revenues among the four companies. The consolidation of these two cases with Pacific's application, for hearing purposes, created no issues before the Commission as to the levels of the charges by the three companies other than Pacific, provided no procedural vehicle for the Commission's authorization of increases in the charges of those three companies, and carried no notice to their customers that their charges might be increased as a result of such consolidation (Pet., pp. 4, 20-21).

The factual situation is not complicated, but the motions to dismiss make it seem so, and they create the impression that the appellants' case rests on claims that the

notice given of Pacific's application and of the commencement of hearings thereon was insufficient, and that full hearings were not finally had upon Pacific's application.

Such is not the case. The facts are actually simple and the appellants' claims are plain: there was no proceeding pending before the Commission in which there was in issue the level of the charges of all four telephone companies for the multi-message unit services rendered by them to their customers in the Los Angeles area. Nevertheless, without any notice whatever that such a motion would be made or that such issues would be raised thereby, the four companies came before the Commission with a motion asking authority to increase such charges. Inescapably, this motion raised issues not only as to the revenues and expenses of that particular service by each company, but as to the total revenues and total expenses of the four companies in their intrastate operations in California, as to the required rate of return of each of the four companies, and as to the earnings of each of them in the Los Angeles area as compared with their returns from their operations outside of the Los Angeles area and from their total California intrastate operations.

There was no opportunity for the customers of any of these companies to adequately prepare to meet these issues or subsidiary included issues, and a full hearing was not had or completed otherwise upon the issues raised by such motion. Moreover, the Commission's own staff necessarily had not completed its preparation, and it offered no testimony or exhibits.[1]

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[1](Its staff told the Commission that it should have some three months at least for its work. It actually commenced its presentation on January 15, 1958, but the motion for interim relief had, of course, then been submitted for decision. The staff's last witness

Nevertheless, the Commission entertained and granted such motion, authorizing a $15,000,000 annual increase in the charges of the four companies for their multi-message unit service solely in the Los Angeles area.

This action by the Commission deprived the appellants, and the telephone customers whom they represent in the Los Angeles area, of their properties without due process of law, and denied them equal protection of the laws, contrary to the Fourteenth Amendment.

The judgment below sustained this unconstitutional action and it should be reversed by this Court upon this appeal.

The denial of Los Angeles' and Arnebergh's Fourteenth Amendment rights is plain, but the denial of Long Beach's and Jacobson's similar rights was even more flagrant.

Los Angeles and Arnebergh at least had notice that the hearing in San Francisco on September 25th would initiate extended hearings looking ultimately to increases in Pacific's charges in the Los Angeles Extended Area for its multi-message unit service. Los Angeles is directly served in part by Pacific although also served directly in part by each of the other three companies, and Arnebergh is served directly by Pacific. Accordingly, on September 25th there was an appearance and participation by Arnebergh's deputy, and a formal appearance made on behalf of the City of Los Angeles in this proceeding for a rate increase by *Pacific* alone.

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completed his testimony on March 4, 1958. The staff finally offered 9 exhibits, totaling some 402 pages, and the testimony of its witnesses extended over 7 hearing sessions and occupies some 463 pages of the transcript of the proceedings which followed the Commission's determination of the interim motion by its Decision No. 55936.)

Long Beach and Jacobson, however, are served directly by General, not Pacific, and they had no intimation that during the hearings on Pacific's rate increase application any proposal would be made for increases in General's own charges to them. There was no reason for them to concern themselves immediately with the hearing on Pacific's application, and accordingly they were not present at the proceedings on September 25, 26 and 27th, but upon word from Los Angeles of the "interim" motion they hastened to the October 3rd hearing, where they complained bitterly that they had not received adequate notice and vigorously objected to the procedure being followed and to the Commission's entertainment of the interim motion (Pet., pp. 22-28, and Appx., pp. 54, 58).

In the end, however, the critical proposition is that the motion for an "interim" increase was made without prior notice and was granted before full hearings had been completed: no better demonstration could be made of that proposition than appears from the Commission's insistence in its motion that in fact there was *ultimately* a full hearing, extending over twenty-six hearing days following the submission of the motion for interim relief (Com. Mo., pp. 5 and 7).

Summary of Argument.

1. The authorities cited by the appellees do not avail against this Court's decisions in *Hollis* and *Wichita* that under the Fourteenth Amendment a state administrative commission must hold a hearing, with all due process incidents including proper notice, before it can become empowered to authorize final increases in a utility corporation's charges to its customers.

2. That Fourteenth Amendment issue is ripe here: its determination was necessary to the judgment below be-

cause the appellants are foreclosed under California law from urging it otherwise before the state courts or again before the state commission in any other proceeding.

3. A state administrative commission does not "represent" those who urge their interests before it, so that it can determine those interests without according notice and a full hearing in derogation of the Fourteenth Amendment.

4. The Commission's reception of the appellants' arguments that it should not entertain the motion for interim relief, and that it had no power to grant it, was not the hearing required by the Fourteenth Amendment, and the appellants' submission of those arguments waived no constitutional claims.

5. By state action and under state law, the increases authorized by the Commission's interim order had to be paid by the appellants and the other affected customers for whom they speak here. The increases so paid by the customers cannot be recovered by them outside of the proceeding brought here on appeal: by the Commission's Decision No. 56109 they are now required to be refunded only upon this Court's determination that the Commission's Decision No. 55936 must fall for its disobedience to the Fourteenth Amendment. Thus the appeal is not moot.

6. And finally, the appellants have standing to press the Fourteenth Amendment violations in their own behalf and for others: in any other event the case is within the principles of *Barrows v. Jackson* (1952), 346 U. S. 249, so that there is need for this Court to protect the fundamental rights of those the appellants represent, who could not by any conception speak effectively in their own behalf.

ARGUMENT.

POINT I.

Contrary to the Contentions of the Appellees in Their Motions to Dismiss, Customers of Regulated Public Utilities Have Rights as Such Which Are Protected by the Constitution of the United States. The Fourteenth Amendment Forbids Authorization by a State Administrative Regulatory Commission of a Final Increase by a Public Utility Corporation in Its Charges to Its Customers Until After a Full Due Process Hearing Has Been Conducted by the Commission.

The appellee Commission categorically asserts under Point II of its motion (pp. 11-14), and the appellee companies similarly assert under Point IV of their motion (pp. 19-25), that public utility customers have no constitutional rights as such under the Constitution of the United States and that specifically they are not entitled to any hearing whatever before a state commission authorizes final increases in the utility's charges to them.

This Court's decisions are directly to the contrary in *Hollis v. Kutz* (1921), 255 U. S. 452, 65 L. ed. 727, 41 S. Ct. 371, and in *Wichita Railroad & Light Co. v. Public Utilities Commission* (1922), 260 U. S. 48, 67 L. ed. 124, 43 S. Ct. 51, and it does not appear that this Court has ever distinguished or overruled its holdings in those decisions.

This Court's decision in *Hollis*, speaking through Mr. Justice Holmes, is determinative also of several of the appellees' dilatory pleas, as will be shown hereafter, but on the main question it completely disposes of the appellees' contentions that customers of a regulated public utility have no constitutional standing.

In *Hollis* the plaintiffs were private customers of the Washington (D. C.) Gas Light Company. Under orders of the Public Utilities Commission of the District of Columbia, their charges had been increased to a level which was higher than would have been required if the United States and the District had been required to pay equivalent charges.

Accordingly, the plaintiffs sought the annulment of the Commission's order under the due process provisions of the Fifth Amendment. Aside from procedural quibbles, which this Court rejected, it was urged in reply that the plaintiffs had no constitutional standing and that in any event they could not urge unlawful discrimination as against the government itself.

On the merits this Court held on the second issue that the United States had lawfully made it a condition of allowing the establishment of the gas works that its needs and the needs of the District should be satisfied at such prices as it might fix, and that the plaintiffs, therefore, could not complain of any unlawful discrimination. But on the question of constitutional standings this Court said:

> "We do not wish to belittle the claim of a taker of what for the time has become pretty nearly a necessity to equal treatment while gas is furnished the public."

And in *Wichita (Wichita Railroad & Light Co. v. Public Utilities Commission* (1922), 260 U. S. 48, 67 L. ed. 124, 43 S. Ct. 51) there were directly presented the plaintiff's Fourteenth Amendment due process and equal protection claims against a rate increase order by a state regulatory commission (260 U. S. 52, 54, 55, 58 and 59, 67 L. ed. 127-130).

In *Wichita* there had been a hearing but the Commission had entered no finding that the existing rates were unjust, unreasonable, unjustly discriminatory or unduly preferential. The plaintiff customer's action to enjoin the effectuation of the Commission's order in the United States District Court rested not only upon diversity, and violation of the contract clause, but upon the Fourteenth Amendment violations as well. The District Court had entered judgment for the plaintiff on the pleadings, but the Circuit Court of Appeals had reversed that decree and directed a dismissal of the bill.

This Court reversed the Circuit Court of Appeals and affirmed the judgment of the District Court.

This Court said, speaking through Mr. Chief Justice Taft:

> "The charge that the order made a classification denying due process and the equal protection of the law was a mixed question of law and fact, upon which the complainant had a right to be heard. Neither court passed on it. For this reason, if there was nothing else, the decree of the circuit court of appeals would have to be reversed. . . .
>
> "There still remain for our consideration the questions upon which the courts below differed. (260 US 55).
>
> "* * *
>
> "The supreme court of Kansas, in applying the statute, recognizes that a contract for rates with a public utility cannot be abrogated except after a finding by the Commission that they are unreasonable. . . . (260 US 57).
>
> "The proceeding we are considering is governed by §13. That is the general section of the Act com-

prehensively describing the duty of the Commission, vesting it with power to fix and order substituted new rates for existing rates.[2] The power is expressly made to depend upon the condition that, after full hearing and investigation, the Commission shall find existing rates to be unjust, unreasonable, unjustly discriminatory, or unduly preferential. We conclude that a valid order of the Commission under the act must contain a finding of fact *after hearing and investigation*, upon which the order is founded, and that, for lack of such a finding, the order in this case was void.

"This conclusion accords with the construction put upon similar statutes in other states. (Cases cited.) *Moreover, it accords with general principles of constitutional government.* The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative (260 US 58) boards to apply to the myriad details of rate schedules the regulatory police power of the state. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith, to give validity to its action. When, therefore, such an administrative agency is required, as a condition precedent to an order, to make a finding

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[2](Cf. Cal. Public Utilities Code Section 728 (Juris. St., Appendix (G), p. 72).)

of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective." (260 U. S. 59; emphasis supplied throughout.)

And subsequently, in speaking of its *Wichita* decision in *Mahler v. Eby* (1924), 264 U. S. 32, 44, 68 L. ed. 549, 554, 44 S. Ct. 283, this Court said that in *Wichita* it had put its conclusion "not only on the language of the statute but also on general principles of constitutional government."

There is no question about it under this Court's *Hollis* and *Wichita* decisions: the Fourteenth Amendment forbids authorization by a state administrative commission of final increases in charges to public utility customers until after the completion of a full hearing with all of the established incidents of due process, including proper notice.

Without any real analysis of that proposition, the appellees deny it, but their citations do not help them.

The Authorities They Cite Do Not Support the Appellees' Contention That the Fourteenth Amendment Has No Force.

It is important that the order by the California Commission here under attack authorized a *final* increase in the companies' charges to their customers, that it binds the customers, and that such order is not subject to collateral attack either before the Commission or in any court, but only to direct attack, in the proceeding below and upon this appeal.

Thus, the decision of this Court in *United States v. Merchants, etc., Assn.* (1916), 242 U. S. 178, 61 L. ed. 233, 37 S. Ct. 24 (Com. Mo., pp. 11, 17; Cos.' Mo., pp. 20, 21), would have no application even if it had followed, rather than preceded, this Court's decisions in *Hollis* and

in *Wichita*. For there this Court concluded that the complaining communities and shippers were not bound by the order entered in a Section 4 proceeding, and that the Act afforded them ample remedy through subsequent proceedings, under Sections 13 and 15. The cities had applied for a rehearing in the Section 4 proceeding, but this Court held that they had mistaken their remedy. The decision is applicable only to the limited matters covered by Section 4 of the Act to Regulate Commerce of 1887.

The Commission says (p. 12) that this Court has considered the essential question on a number of occasions and that it has decided it contrary to the appellants' contentions. No support is offered for that sweeping statement except *Midland Realty Co. v. Kansas City Power & Light Co.* (1937), 300 U. S. 109, 81 L. ed. 540, 57 S. Ct. 345.

But the decision in *Midland* is not pertinent. The essential fact there was that although others had sought administrative relief from the Missouri commission, and the Midland Company could have, it had not, and although others had directly attacked the commission's decision,[3] and the Midland Company could have, it had not.

Nor does this Court's decision in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.* (1956), 350 U. S. 332, 100 L. ed. 373, 76 S. Ct. 373, in any way limit the scope or the effect of the decision in *Wichita* as the Commission and the companies suggest at pages 12 and 24 of their respective motions.

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[3]*State ex Rel. Case v. Public Serv. Commission* (1923), 298 Mo. 303, 249 S. W. 955, and see the decision below, *Kansas City Power & Light Co. v. Midland Realty Co.* (1936), 338 Mo. 1141, 93 S. W. 2d 954.

In *United* the plaintiff did not attack on constitutional grounds the provision of the Natural Gas Act that industrial rates should go into effect automatically, without suspension, and without any hearing by the Commission. The sole question before this Court was one of statutory interpretation, and this Court found support in *Wichita* for its conclusion in *United* that under the Natural Gas Act a regulated public utility cannot unilaterally change a contract rate.

Ignoring Section 728 of the Public Utilities Code, the Commission further makes the assertion (Com. Mo., pp. 13-14) that the California statutory requirement for a "showing" and for a finding is unusual. This assertion is made without stated support and it is believed to be inaccurate, but the question here is not whether the statutes of California or other states do require full due process hearings, but rather that the Fourteenth Amendment requires that an administrative state commission conduct a full hearing before it can become empowered to authorize final increases in utility charges.

A more detailed examination of such contentions when the time comes for briefs on the merits might be appropriate if the question were novel. But the question is not novel and it has been settled adversely to the appellees in the *Hollis* and *Wichita* decisions of this Court.

The Commission also suggests that under various federal regulatory statutes increased charges may become effective without a hearing if the regulatory commission fails to suspend them. The Commission cites no decision by this Court that an affected customer is without protection under the Fifth Amendment in such a case. Even if this Court were to hold that the administrative establishment and regulation of a monopolistic activity under

Congressional authority creates no right in customers to a due process hearing under the Fifth Amendment before the administrative commission can authorize increased charges, it would not follow that this Court's *Wichita* decision no longer establishes Fourteenth Amendment protection against arbitrary administrative state action. There would be grounds for distinction in such an event, but it is unnecessary to explore them here since no such decision appears.

In any event, it would presumably be the application of the federal statutes that would be called in question, rather than the statutes themselves, and no such question could arise except where the federal commission failed to suspend a proposed schedule and to proceed to a hearing on it.

For instance, the City of Los Angeles has itself on several occasions asked the Federal Power Commission to suspend natural gas rates under Section 4(e) of the Natural Gas Act. In each such instance the schedule in question has been suspended and a full hearing has followed. Where the schedule has become temporarily effective after such suspension, pending the Commission's final decision, the increases so effected have, of course, been subject to refund, and upon such facts there would appear to be little basis for any subsequent complaint that the Fifth Amendment had been ignored.

Here again the fact that constitutional violations have not been brought to this Court's attention would seem to demonstrate general administrative compliance with constitutional requirements, as there generally was compliance by the California Commission prior to the proceeding involved in this appeal.

Carlsen v. United States (1952), 107 Fed. Supp. 398 (cited by the Commission at p. 14) merely holds that the exercise of its discretion by the Interstate Commerce Commission in refusing to suspend the effectiveness of filed transportation rates is not reviewable by the courts. No constitutional questions were considered, and it is familiar doctrine that the judicial department has very limited power to revise statutory provisions.

In their footnotes on pages 21-23 the companies cite several state court decisions to support their contentions that public utility customers have no protection under the Fourteenth Amendment, and on page 22 they state that such is the effect of *United States Light & Heat Corp. v. Niagara Falls Gas & Electric Co.* (1931), 47 F. 2d 567.

The decisions so construed by the companies to deny rights under the Fourteenth Amendment to public utility customers are for the most part not apposite and otherwise they are neither controlling or persuasive, since they cannot be reconciled with this Court's decision in *Wichita.*

With the exception of *State v. Mountain States Tel. & Tel. Co.* (1950), 54 N. M. 315, 224 P. 2d 155, an analysis of each of these decisions is in the record (Appx. to Pltf. Reply to the Answ. in S. F. No. 19900), and since the direction of this brief to the merits is appropriate only as it is compelled by the enlargements of the appellees' motions, that analysis will not be duplicated here.

From the *United States Light & Heat* decision it appears not only that the suit was collusive but that the plaintiff had not complained "under the several provisions of the (New York) Public Service Law" of the rates which it asked the District Court to enjoin. Apparently the Circuit Court of Appeals fully recognized the customer's right to a full hearing, for it said:

> "If there be an exercise of arbitrary power against the consumer and wrongful enforcement by the commission of the Public Service law, a remedy is afforded under the provisions referred to for the consumer to lodge his complaint, obtain a hearing and redress." (47 F. 2d 570.)

As will be shown hereafter there are no such administrative remedies available under California law.

Of the other decisions so cited by the companies only one is precisely inconsistent with this Court's decision in *Wichita,* which it preceded: *Bartlesville v. Corporation Commission* (1921), 82 Okla. 160, 199 Pac. 396. *Consumers' Gas Co. v. Corporation Commission* (1923), 95 Okla. 57, 218 Pac. 126, followed and cited the *Bartlesville* decision, but there the complaining cities had participated in the hearing before the Commission without objection to the sufficiency of the notice and without any suggestion that they were not prepared to proceed. The Oklahoma Supreme Court simply held that this constituted a waiver of notice if any was required.

Some of the other decisions cited by the companies contain dicta which out of context would seem to support the companies' assertion that the Fourteenth Amendment does not extend to public utility customers, but otherwise they do not at all support that contention.[4]

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[4]*Boston Real Estate Board v. Department of Public Utilities* (1956), 334 Mass. 477, 136 N. E. 2d 243, and *Gateway City Transfer Co. v. Public Service Commission* (1944), 245 Wis. 304, 14 N. W. 2d 6, have no application to the facts here. *Gateway* did not involve customers' charges at all, and *Boston* involved no due process hearing question. *City of New Haven v. New Haven Water Co.* (1946), 132 Conn. 496, 45 A. 2d 831, presented only the question of the authority of a state to supersede charges exceeding those provided under a municipal contract. (*Cf., Los Angeles Railway Corp. v. Railroad Commission and the City of Los Angeles* (1929), 280 U. S. 145, 74 L. ed. 234, 50 S. Ct. 71.) In *Ten*

The other decision cited by the companies, on page 22, is *State v. Mountain States Tel. & Tel. Co.* (1950), 54 N. M. 315, 224 Pac. 155. The case was before the New Mexico Supreme Court on appeal from an order by the Corporation Commission increasing telephone charges, and it was held that the Supreme Court did not have jurisdiction to set aside a rate made by the Commission *after a full hearing on prior notice.* The decision basically rests on the idea that the courts cannot make rates, but it should be noted that the Court also said that "Rates fixed or ap-

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Ten Lincoln Place v. Consolidated Edison Co. (1947), 190 Misc. 174, 73 N. Y. S. 2d 2, aff'd 273 App. Div. 903, 77 N. Y. S. 2d 168; *Childs v. Brooklyn Edison Co. of New York* (1951), 105 N. Y. S. 2d 503, and *McCormick v. Westchester Lighting Co.* (1931), 141 Misc. 261, 252 N. Y. S. 454, it was held merely that the plaintiff's recourse was first to the commission. (The appellants have never contended that the Fourteenth Amendment requires that public utility customers be heard first, or *de novo,* by the courts.) In *Lenihan v. Tri-State Telephone & Telegraph Co.* (1940), 208 Minn. 172, 293 N. W. 601, and in *City of Birmingham v. Southern Bell Tel. & Tel. Co.* (1937), 234 Ala. 526, 176 So. 301, there had been a full hearing before the commission prior to its rate increase order. *Lenihan* held only that a settlement of pending litigation bound the parties and *Birmingham* only that public utility customers have no right under the Constitution to a judicial trial *de novo* after they have been fully heard by the Commission. In *State v. Municipal Corporations of Scotland Neck* (1955), 243 N. C. 193, 90 S. E. 2d 519, there had been a full hearing before the Commission and a trial *de novo* in the Superior Court and in *City of Atlanta v. Ga. Ry. & Power Co.* (1919), 149 Ga. 411, 100 S. E. 442, there had been a full hearing before the Commission in which the City had participated, and under Georgia law there could be a judicial trial *de novo.* Any observations on constitutional questions in these decisions are pure dicta and such is the case also in *State v. Rawlings* (1951), 229 Ind. 552, 99 N. E. 2d 597, and in *Union Dry Goods Co. v. Ga. Public Service Corp.* (1916), 145 Ga. 658, 89 S. E. 779, since it appears from *Rawlings* that Indiana customers are entitled to a hearing if they object to proposed increased charges, and in *Union* it does not appear that there had not been a hearing. Moreover, none of the decisions cited by the Indiana Court support its dicta in *Rawlings* interpreting the Constitution, and the decision in *Union* preceded this Court's *Wichita* decision.

(All of these decisions were considered at greater length in the appellants' reply to the answers below. Such reply is part of the record here.)

proved by the commission without a hearing are void (224 P. 2d 166-167)."

The companies next contend that the appellants have other remedies under California law, and that consequently their constitutional claims are not ripe here. This contention is not sound. It is significant that the Commission makes no such assertion here, and that it made none such below, and consequently the judgment below cannot be construed against the appellants on any such state ground.

POINT II.

After the California Public Utilities Commission Has Made a Finding of Reasonableness and Has Authorized Increases in a Utility's Charges, the Affected Customers May Not Bring Any Collateral Attack in the California Courts, nor May They Question Such Increases in a Reparation Proceeding Before the Commission. The Customers' Sole Remedy for Fourteenth Amendment Violations Preceding Such a Commission Order Is in a Review Proceeding, Following the Commission's Refusal to Rehear Its Order, or on Appeal to This Court From the Judgment Therein, as Here.

Section 1731 of the California Public Utilities Code provides:

> ". . . No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has made, before the effective date of the order or decision, application to the commission for a rehearing."

Section 1732 provides:

> "The application for a rehearing shall set forth specifically the ground or grounds upon which the

applicant considers the decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in the application."

Section 1735 provides:

"An application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision, or any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except in such cases and upon such terms as the commission by order directs."

Section 1756 provides:

"Within 30 days after the application for a rehearing is denied . . . the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision . . . inquired into and determined. . . ."

Section 1757 provides:

"No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the Commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this Article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination."

Section 1758 provides:

> "The Commission and each party to the action or proceeding before the commission may appear in the review proceeding. Upon the hearing the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the commission. . . ."

Section 1759 provides:

> "No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof. . . ."

Section 1760 provides:

> "In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final."

Nor is there any remedy under California law by collateral attack before the Commission itself:

Section 734 of the Public Utilities Code provides:

> ". . . No order for the payment of reparation upon the ground of unreasonableness shall be made by the commission in any instance wherein the rate in question has, by formal finding, been declared by the commission to be reasonable. . . ."

And Section 1709 provides:

> "In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive."

Moreover, if the question were open, *Smith v. Illinois Bell Telephone Co.* (1926), 270 U. S. 587, 70 L. ed. 747, 46 S. Ct. 408, would be pertinent. There the appellants urged that the company should have instituted another and distinct proceeding, but this Court said that to require this would be to put aside substance for needless ceremony. And in *Hollis v. Kutz, supra* (1921), 255 U. S. 452, 65 L. ed. 727, 41 S. Ct. 371, this Court saw no sense in a construction which would require a new complaint asking a commission to review a decision just reached by it, particularly where the issue is a constitutional one.

Thus the appellants' Fourteenth Amendment rights have been established by this Court's decisions. California impaired those rights by the Commission's Decision No. 55936, the California Supreme Court failed to set aside such unconstitutional state action, and the issue is ripe for decision here.

If the Commission and the companies actually believe that the procedure followed by them was proper, then it would appear they, too, should seek a hearing on the merits, so that this Court could expressly overrule the *Hollis* and *Wichita* cases, as would be necessary were such procedure to be sustained.

Unfortunately, the appellees seek instead to avoid a determination on the merits by specious and dilatory pleas. The remainder of this argument will consider those pleas, although they are largely answered by the facts shown in the enlarged statement herein of the proceedings before the appellee Commission.

POINT III.

Although the Commission Has Governmental Powers, to Be Exercised Like All Such Powers to Promote the Public Welfare, It Does Not on Such Account "Represent the Public" so That Its Powers Can Be Exerted Without Restriction by the Fourteenth Amendment.

The appellees' contention that California public utility customers have no constitutional rights are tempered by the assertion that the customers' interests are represented by the Commission itself, and they cite a number of decisions in which it is observed that the administrative commission must exercise its powers to protect the rights of the public, or that the Commission represents the public interest, and so forth.

This argument is obviously specious. All governmental departments and agencies are established for the promotion of the public welfare, and it could as well be urged that one has no right to a trial or hearing before any court, or before other officers or boards exercising quasi-judicial powers.

The very genius of the due process conception is that men are fallible, that no matter can be known until it has been heard, and that conflicting interests and claims can only be reconciled or determined upon their full assertion.

None of the decisions cited by the appellees in this connection involved facts like those here.

It has been noted that the decision in *United States v. Merchants, etc., Assn.* (1916), 242 U. S. 178, 61 L. ed. 233, 37 S. Ct. 24, is applicable only to proceedings like those involved there.

In *Smith v. Illinois Bell Telephone Co.* (1926), 270 U. S. 587, 70 L. ed. 747, 44 S. Ct. 408, the company had secured an order from the United States District Court enjoining the Illinois commisison from enforcing a certain schedule of telephone rates. There was no conflict between the commission's decision and the assertions on the subscribers' behalf, and it was held only that there had been no need to bring the subscribers before the trial court.

In *City of New York v. New York Telephone Co.* (1923), 261 U. S. 312, 67 L. ed. 673, 43 S. Ct. 372, the appeal was from the United States District Court's denial of a motion by the City of New York to be a party defendant. There was no difference between the claims of the New York commission and those of the city, and the record showed that they were cooperating fully in the defense. It was held only that under such circumstances the District Court's order involved no abuse of discretion.

Nor is there any similarity between the facts here and the facts in the California cases cited by the companies.

Sale v. Railroad Commission (1940), 15 Cal. 2d 612, 104 P. 2d 38, involved a certificate of public convenience and necessity, not rates, and it was held only that nothing prevents a regulatory commission from proceeding *ex parte* in a certificate proceeding. (*Cf., Gateway City Transfer Co. v. Public Service Commission* (1944), 245 Wisc. 304, 14 N. W. 2d 6, cited by the companies at p. 21.)

Neither did *Hanlon v. Eshleman* (1915), 169 Cal. 200, 146 Pac. 656, involve charges to customers.

And *Pacific Telephone & Telegraph Company v. Eshleman* (1913), 166 Cal. 640, 137 Pac. 1119, involved only a commission order requiring the connection of Pacific's long distance lines with the local lines of two independent companies. There was no question as to notice or hearing: the case turned upon the issue of Pacific's entitlement to compensation in advance before it could be required to devote its properties to a use for which they had not been dedicated.

POINT IV.

The Appellants' Opposition to the Interim Motion Did Not Waive Any Constitutional Claims for Them or for Others, and the Denial of Due Process Is Established in the Record.

The Commission and the companies first assert that the individual appellants, Arnebergh and Jacobson, are bound by the Commission's proceedings to the time the motion for "interim" relief was submitted on October 10, 1957, and thus by Decision No. 56652 affirming the "interim" order, Decision No. 55936, because they had appeared in those proceedings through their deputies as counsel for the appellant cities and in the next breath they assert that Arnebergh and Jacobson have no standing here because they did not formally appear individually in those same proceedings.

The fact is that right up to the submission of the "interim" motion the appellants vigorously urged the Commission's lack of jurisdiction to entertain it or to grant it. This is clearly shown in the record, and it is the sheerest

sophistry to contend that there was any waiver in the submission of such objections or that a due process hearing was accorded merely because the Commission listened to arguments that it had no jurisdiction to proceed.[5]

To contradict this record, the Commission and the companies rely chiefly on the Commission's self-serving statements in its Decision No. 56048 (Juris. St., Appx. (E), pp. 57-63, esp. pp. 61-62):

> "No suggestion or request was made by any of these parties for a continuance to enable said parties to present evidence. Also, the motion for interim rate relief was argued by the parties, including the City of Los Angeles and other protesting and interested parties. In these circumstances, the repeated insinuation of petitioners that the interested parties were denied an opportunity to be heard and that a full hearing was not had on the motion for interim relief is disingenuous, to say the very least."

The language of this Court in *Morgan v. United States* (1936), 298 U. S. 468, 80 L. ed. 1288, 56 S. Ct. 906 at 477, is applicable here:

> "These suits for the review of the administrative action were thus directly authorized and appeal lies.

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[5]Even the Commission's abbreviated statement of the cities' positions in its interim decision, No. 55936 (Juris. St., Appx. (B), pp. 11-12), makes it clear that there was no waiver, and it also clearly appears from that decision that no prior notice of the "motion for interim relief" had been given (*id.*, p. 6) and that the hearing had not been completed when the motion was taken under consideration for decision (*id.*, pp. 3-7, 16-18). This is all more fully shown elsewhere in the record (Pet., pp. 1-15, 18-29, 35-42, 46-47, and 53-55, in the Appx. thereto at pp. 1-5, 9-11, 14-16, 21-36, 31-54, and in App. Reply to Answ. Below, at pp. 2-5, 8, 40-42, and 52-53). Moreover, the appellants' essential allegations in their petition to the California Supreme Court were fully supported by references therein to the transcript of the proceedings before the Commission (Pet., pp. 20-27), and that petition was verified.

> . . . All questions touching the regularity and validity of the proceeding before the Secretary are open to review. . . . When the Secretary acts within the authority conferred by the statute, his findings of fact are conclusive. . . . But, in determining whether in conducting an administrative proceeding of this sort the Secretary has complied with the statutory prerequisites, the recitals of his procedure cannot be regarded as conclusive. Otherwise the statutory conditions could be set at naught by mere assertion. If, upon the facts alleged, the 'full hearing' required by the statute was not given, plaintiffs were entitled to prove the facts and have the Secretary's order set aside."

At pages 16 to 19 the companies say that the appellants have not supported their "naked assertions" as to lack of due notice and hearing by bringing up the record before the Commission, citing *Mississippi Valley Barge Line Co. v. United States* (1934), 292 U. S. 282, 78 L. ed. 1260, 54 S. Ct. 692; *Edward Hines Yellow Pine Trustees' v. United States* (1923), 263 U. S. 143, 68 L. ed. 216, 44 S. Ct. 72; and *Nashville, Chattanooga, & St. Louis Railway v. Tennessee* (1923), 262 U. S. 318, 67 L. ed. 999, 43 S. Ct. 583.

Those decisions do not require an appellant in such a case as this to bring up anything but the record which was before the court below: the appellants have done that, and could not have done more. Each of those decisions was on an appeal from a decree of a United States District Court in an action which had been brought to review orders made by the Interstate Commerce Commission, and this Court held that the complainants should have brought in necessary parts of the record to support the attack made by them upon the Commission's order.

This is not such a case: this appeal tests the judgment of the California Supreme Court which sustained the application of the Commission's Decision No. 55936 so as to deprive these appellants of their properties without due process of law, and so as to deny them the equal protection of the laws. The Court below refused to bring up the record before the Commission, and the record here could in no way have been enlarged so as to include the Commission's record.

The issue here is one of constitutional rights, to be determined upon the record which was before the Court below when it refused to recognize those rights.

Nor is there any expression in *United States v. Miller* (1943), 317 U. S. 369, 87 L. ed. 336, 68 S. Ct. 276; *Doty v. Love* (1935), 295 U. S. 64, 79 L. ed. 1303, 55 S. Ct. 558; or *Detroit, Fort Wayne & Belle Isle Railway v. Osborn* (1903), 189 U. S. 383, 47 L. ed. 860, 23 S. Ct. 540, which supports any excuse by the Commission of its failure to require proper notice of the motion for "interim" relief. The companies cite those decisions at page 19 to support their contention that the appellants' participation in the argument on the interim motion waived all objections that proper notice of the motion had not been given. In *Miller* the respondents had been fully protected throughout and their only complaint was that the District Court had not given them advance notice of the particulars of its judgment. In *Doty* it was held only that after the appellant had appeared and been fully heard on the merits they could not complain that they had originally had insufficient notice, and in *Detroit* the court rejected the company's complaint that the statute did not require notice, since notice had in fact been given and the company had been fully heard.

There was no claim in any of these cases that there had not been a full opportunity to prepare to meet the factual issues, and the decisions have no application to this case, where the basic vice was not only that there was no prior notice of the motion, and no opportunity to prepare, but that the issues were not fully explored before the Commission determined them by its interim decision, No. 55936.

There is some parallel here with the *Wichita* facts as they are reported below in *Public Utilities Commission v. Wichita Railroad & Light Co.* (1920), 268 Fed. 37. There the plaintiff customer had objected to the Commission's jurisdiction in the proceeding before the Commission on the utility company's application for authority to increase its charges. The Commission had overruled that objection, which urged the customer's contract, but the Commission's order of authorization was finally restrained under this Court's decision on appeal upon grounds which arose after the customer's first appearance.

POINT V.

The Appellees' Other Dilatory Pleas Are Without Merit.

A. The Appeal Is Not Moot.

The appellants and the affected customers whom they represent have had to pay increases in telephone charges at the rate of $1,250,000 a month, under the compulsion of the Commission's interim decision, No. 55936. Those increases are refundable only according to the Commission's Decision No. 56109, if "Decision No. 55936 be annulled by the Supreme Court of California or any other court of competent jurisdiction." Thus, if this

appeal were to be dismissed, the increases paid would not be refunded and could not otherwise be recovered, but following this court's reversal of the judgment below, they would be refunded.

Under these circumstances, the claim that the appeal is moot necessarily involves some nimble shuttling. Basically it rests on the idea that the Commission's later decision, No. 56652, affirmed and ratified the interim decision.

The appellees' arguments are not stated overtly but they seem to say:

(1) The earlier decision, entered without the required notice and due process hearing, has become merged in the later decision, and is reviewable only upon the whole record, or

(2) Decision No. 56652 was entered after a full hearing. Upon an extensive record the Commission then determined that its conclusions upon the incomplete record had been correct. Since that later decision is final, it gives unimpeachable validity to the earlier decision involved in this appeal.

If the appellees' argument rests upon the first theory, it misleads. As the appellants showed in the Jurisdictional Statement (pp. 3, 11), they anticipated such a procedural trap by filing with the California Supreme Court a petition to review Decision No. 56652, as it ratified and affirmed Decision No. 55936. Both the Commission and the companies pleaded as *res judicata* the judgment of May 21, 1958, from which this appeal is taken, and the California Supreme Court thereafter denied that petition under SF No. 20007. The appellees cannot now reverse their position by claiming that the

constitutional issue did not become ripe for review on this appeal upon the entry of the judgment below, on May 21, 1958.

The alternative argument is just as specious, and it comports neither with sound philosophy nor with human nature.

A party is entitled to adequate notice and a fair hearing, without regard to the eventual determination of the case, or the Fourteenth Amendment is without real meaning. To say in advance that his claims should be rejected, and that therefore he need not be heard, is to beg the question and to propose the nullification of the whole doctrine of Fourteenth Amendment due process, including its prohibition of *ex post facto* state action.

On the other hand, only the most naive would rely upon eventual fair treatment by supposing that a summary decision will be reversed by him who made it after he has finally heard the whole story. It is not a praiseworthy attribute, but it is nevertheless human, that one holds to a decision once made and strives to rationalize it rather than to confess error. And this is all the more true where the confession would not only demonstrate original error, but would establish the fact that irreparable damage had been done under it.

If the Commission had recognized in the final order after the full hearing that it had been unsound and unfair to require the Los Angeles Extended Area[6] ratepayers to pay such increases that Pacific's rate of return from its exchange operations in that area was raised from 7.01% to 8.29%, the charges in other areas would earn

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[6]As described in footnote No. 4, on page 9 of the Jurisdictional Statement.

at a rate as low as 2.68% (as evidence showed), it would have recognized the unfairness of the interim order which effected that result. Consequently, it would have determined in its final order that the interim order had been ill-advised, and it would have adjusted the rates it authorized in the Los Angeles area to effect a less discriminatory result.

But in such a case the Commission would itself have established the fact that the payment of the increased charges by the Los Angeles subscribers in the meantime had unfairly deprived them of some five million dollars, and the Commission would have been without power to correct that result, for there was no provision for any refunds in the event that its own final order should disaffirm its interim order.

The Commission could have escaped being confronted with such a dilemma by granting the appellants' petitions for a rehearing of the interim order, but it chose not to do so and it denied those petitions on January 7, 1958 (Juris. State., Appx. C, D, E, F, pp. 25-66).

Any realist, then, would say, as of January 8, 1958, that the chance was infinitesimal that the Commission would not finally affirm its interim decision, no matter what the evidence might be.

The proposal that a final decision by a state administrative board can cure the effect of an earlier order, *ex post facto*, in denial of due process rights, proposes *carte blanche* authority to substitute mere form for the substance of the Fourteenth Amendment.

None of the decisions cited by the appellees in this connection is pertinent. They involve cases where the final judgment in an injunction proceeding rendered moot a separate appeal from a consistent interlocutory order.

But in *Prendergast v. New York Tel. Co.* (1923), 262 U. S. 43, 67 L. ed. 853, 43 S. Ct. 466, a somewhat similar contention by a telephone company, in reverse, was rejected by this Court. There the New York Commission had temporarily reduced the company's rates and the company had secured an interlocutory order from the United States District Court enjoining enforcement of the reduction order, under a $6,000,000 bond to secure the repayment of all excess charges paid in the event the injunction should be dissolved. Thereafter the company moved to affirm the interlocutory injunction on the ground that the Commission had later established a schedule of rates which would yield a higher return than the enjoined temporary rates. The company claimed that this showed that the District Court's injunction was properly granted. This Court held, however, that the Commission's later order, upon evidence not before the Court, did not establish that the injunction was rightly granted under the conditions which then existed, and it denied the company's motion.

B. The Appellants Were All Plaintiffs Below and Are Parties of Record Here, With Standing in Themselves, and in Representative Capacities, to Urge the Fourteenth Amendment Violations.

The appellees urge that the appellant cities can urge no federal claims under this Court's decisions, that the appellants Arnebergh and Jacobson cannot be deemed to have been proper parties below, or to be parties here, and that consequently none of the appellants can urge the Fourteenth Amendment violations in behalf of other affected subscribers.

These contentions are unsound and as will be shown under Point VI, such pleas go to this Court's discretion

rather than to its jurisdiction, and should be brushed aside so that the Court can reach the basic question and thus protect the fundamental rights of the other affected subscribers, who could not practicably have personally urged their claims below.

The three phases of the appellees' pleas on standing will be considered separately.

1. THE APPELLANT CITIES HAVE STANDING IN THEIR OWN BEHALF.

On page 7 the companies cite eight decisions by this Court to support the assertion that state power may be exerted against cities without any hindrance at all by the Constitution of the United States. Three of those decisions are similarly cited by the Commission also, at page 15, with *Pederson v. Portland* (1933), 144 Ore. 437, 24 P. 2d 1031. In several instances these decisions are more narrow than the appellees suggest, holding only that a state legislature may supersede a municipal contract in the exercise of the police power, and in only a few was there necessarily any consideration of the distinction between a city's rights or privileges as a governmental entity and its rights and privileges in behalf of its residents and taxpayers, as the custodian of their property interests in its proprietary establishments.

Moreover, Los Angeles and Long Beach are home rule chartered cities: essentially they derive their powers directly from the people of California through the Constitution (Art. XI, Secs. 8, 8½, 11, 12, 13, 19) rather than from the State Legislature, and there seems to have been no occasion, either in *Railroad Commission v. Los Angeles Railway Corp* (1929), 280 U. S. 145, 74 L. ed. 234, 50 S. Ct. 71, or elsewhere, for determination of the

effect of the broad language of such decisions as *Williams v. Mayor* (1933), 289 U. S. 36, 77 L. ed. 1015, 53 S. Ct. 431, to situations where that basic distinction is presented.

These considerations are all in the record, as being within the judicial knowledge of the Court below, as is the proposition that within their constitutional powers (Cal. Const., Art. XI, Sec. 19) the appellant cities own and operate water, electric power, gas, harbor and airports departments in their proprietary capacities. Thus, of the some $1,250,000 in telephone charges incurred annually by the City of Los Angeles, about $450,000 is incurred by its proprietary departments.

It is submitted that if this appeal were to be dismissed upon the appellees' objections to the cities' standing, the unhappy results would inferentially include the determination by this Court of very difficult questions, previously undecided, which are raised by these two considerations.

When it becomes necessary to determine these questions, the appellant cities are convinced that it should be decided that the general language of decisions like *Williams* has no application to the appellant cities or to arbitrary state action which would divest a city's taxpayers of enormously valuable enterprises which have been constructed by them without fear that they might be snatched away contrary to general constitutional principles and to the detriment, not only to the City, but also to the creditors and bond holders, who certainly are protected by the Constitution. But this Court need not reach these difficult questions here for a decision on the due process question presented. The individual appellants clearly have standing, and the appellees' doubts of the

appellants' representative standing are without foundation.

Here, as elsewhere in this brief, the appellants are aware of observations by this Court that its refusal to hear a case on the merits does not imply its approval of the judgment, much less its endorsement of every contention advanced by the appellees or respondents. Nevertheless, the importance of the questions here presented must be weighed with full recognition that the dismissal of this appeal would in the fields of public law and public utility regulation have, for practical purposes, the effect of a decision for the appellees on the merits, without the limitations on that effect which would follow from an opinion by this Court upon affirmance.

2. The Individual Appellants.

The record clearly shows that the appellant Arnebergh is a subscriber of the Pacific Company within the Los Angeles Extended Area, that the appellant Jacobson is a subscriber of the General Company within that area, that the increases in the four companies' charges under the Commission's interim decision adversly affected them both, as they did practically every other subscriber of the four companies within that area, and that the total of the increases to the subscribers in that area was $15,000,000 annually [Juris. State., Appx. C and D, pp. 25, 48; Rec., Pet. pp. 9-11]. Moreover, Arnebergh and Jacobson were plaintiffs below and are parties of record here.

Nevertheless, their standing is disputed, on the theory that they were not entitled to seek a rehearing from the Commission, and that only those who have standing to seek a rehearing, and who do so, have standing afterward to petition the California Supreme Court for review.

The short answers are (1) that a utility company's customers are pecuniarily interested in the company, within the meaning of Section 1731 of the California Public Utilities Code (Juris. State., Appx. G, pp. 76-77), and may therefore apply to the Commission for a rehearing of a rate increase order, and (2) that any resident of a city participating in the proceeding is already a party by the city's representation, and clearly may appear individually at any time. This latter, consistent, view, moreover, accords with the Commission's established practice.

The appellees, however, strain to exclude Arnebergh and Jacobson by contending that the question is one for the state court and that it was there decided adversely to the appellants.

It it were assumed that such contention could be technically supported, such construction of the statute would be denied recognition for its variance with the Constitution.

Otherwise, this would be the case in California:

(1) The Commission could grant a rate increase without notice or hearing, and without making any investigation or considering any evidence. It could even do this on its own motion. Such grant could increase the utility's charges to the customers' utmost capacities to pay, without any limitation according to the company's costs or earnings requirements, and it could effect discriminations without limit among customers, areas, localities and classes of service.

(2) Such action could be taken in secret, and knowledge of it by the public could be gotten only after its placement in the Commission's records. Moreover, such

an order could be made effective immediately, and thus obligate customers before they knew of the increase (Cal. Pub. Util. Code, Secs. 1705, 1709; Juris. State., Appx. G, pp. 75-76).

(3) No one in such a case could ask for a rehearing, since no one had been a party to the proceeding, and if the order were made effective immediately under Section 1705, the provisions of Sections 1731, 1756 and 1759 of the Code would further bar any petition for rehearing (Juris. State., Appx. G, pp. 76-78. See *Clemmons v. Railroad Commission* (1916), 173 Cal. 254, 159 Pac. 713, where there was such a result.)

(4) A grant of rate increases by the Commission in such manner would then be entirely beyond reach by any customers, under the provisions of Sections 734, 1709, 1731, 1756 and 1759 of the Code (Juris. State., Appx. G, pp. 73, 76-78).

By such a process, according to the appellees' contentions, the most arbitrary administrative action imaginable could be placed by state law entirely beyond the reach of any action before the courts. Such a construction does not accord with general constitutional principles, or with the Fourteenth Amendment.

3. The Appellants as Customer Representatives.

As this Court knows, a proceeding before an administrative commission on issues involving utility charges is difficult and complicated to a degree which is increased almost geometrically according to the utility company's size, the number of its customers, and the ramifications of its operations. The utility's resources to present its case are practically unlimited, particularly since its expenses in regulatory proceedings are ordinarily fully rec-

ognized as costs to be assessed against and paid by its customers, even by rate increases when such costs result in reducing the company's earnings below a level found to be workable.

If there is to be any effective examination of the utility's case, then accounting, engineering and legal talent must be available for that purpose in some reasonable proportion. Consequently there must normally be heavy reliance on the Commission's staff by customer appearances, and it should be here remembered that the Commission received no evidence from its staff before the submission of the interim motion involved here. In any event, any effective inquiry, either to complement the staff's work, or to explore conflicting customer interests, usually can come only from customers who have very heavy stakes.

Under these circumstances it is vain to suppose that individual customers can or will appear before a commission and effectively speak for their interest, or to suppose that any other spokesmen than cities and other political entities, *parens patriae,* will come forth in their behalf.[7]

Recognizing these realities, no doubt, the Court of Appeals for the District of Columbia sustained Pittsburgh's standing in a situation which was less demanding, if anything, because the commission action Pittsburgh wished to attack would not itself immediately affect it.

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[7]*Cf., Georgia v. Pennsylvania Railroad Co.* (1945), 324 U. S. 439, 89 L. ed. 1051, 65 S. Ct. 716, esp. at pp. 443-451, and particularly in the light of the fact that Los Angeles and Long Beach are home rule chartered cities whose existence and powers originate and directly flow from the Constitution of California, as developed in summary on pages 38-39, *supra,* under Point V, B, 1.

The decision is *City of Pittsburgh v. Federal Power Commission* (1956), 237 F. 2d 741, where Pittsburgh and others sought to annul the commission's order that the Texas Eastern Transmission Corporation might abandon a portion of the Little Inch gas pipeline and substitute another facility. In discussing Pittsburgh's standing, the Court stated (pp. 748-749):

> "The City of Pittsburgh and its residents are consumers of natural gas delivered through the Little Inch pipeline. It is conceded that Pittsburgh would be aggrieved by a reduction of supply or increase of cost of gas to the consumer. But there is nothing in this record to show that this order would immediately have such consequences and Pittsburgh does not claim that it will. What Pittsburgh claims is that the Kosciusko line can, at relatively little cost, be expanded to carry additional gas when demand increases and that, if this 'cheap expandibility' of the Kosciusko line were now to be exhausted as a replacement for the abandoned Little Inch, future expansion would require expensive construction of additional facilities, the cost of which would be reflected in increased rates to consumers.
>
> "If these claims are true, Pittsburgh has standing to challenge the order. Though rate increases would occur only in the future, there is nevertheless an immediate injury: the exhaustion of the Kosciusko line's 'cheap expandibility.' It is argued, however, that there has been no showing of the likelihood of future expansion of natural gas deliveries or of the effect of such expansion upon consumers. But Pittsburgh's standing must be taken as proven, because proof was forestalled."

POINT VI.

In Any Event the Appellees' Dilatory Pleas Go to This Court's Discretion, and Not to Its Jurisdiction. The Court Should Brush Such Quibbles Aside and Come to Grips With the Basic Question Presented on This Appeal.

If the appellees' objections to the appellants' standing seem at all tenable, the facts bring this case within *Barrows v. Jackson* (1953), 346 U. S. 249, 97 L. ed. 1586, 73 S. Ct. 1031, and the decisions cited therein, since it clearly would have been difficult, if not impossible, for the individual customers in the Los Angeles area to have themselves asserted their claims to the Commission before October 10, 1957, or at all, and for them then to have brought their claim to this Court, after such a weary pilgrimage as these appellants have had to follow.

This is here particularly true because individual customers through the Los Angeles area have in the past relied upon the representations of Los Angeles, Long Beach and other cities for the protection of their interests before the appellee Commission, and have necessarily assumed that their representation by the cities would fully protect their Fourteenth Amendment rights as well as their rights under California law.

Conclusion.

The appellants believe that the judgment below resulted in a clear violation of their Fourteenth Amendment rights and of similar rights in the other customers for whom they speak, that this federal question is clearly ripe for review here, that they have standing to urge it, and that in any event it should be determined by this Court for

the protection of fundamental rights which otherwise would fall.

Moreover, the appellants believe that the basic question presented has magnitude nationally, and that it should be determined here to assure future obedience by state administrative agencies to the Constitution of the United States.

It is, therefore, respectfully submitted that this Court's jurisdiction appears, that the question is substantial, and that the motions to dismiss should be denied.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,

ALAN G. CAMPBELL,
Assistant City Attorney,

Attorneys for the Appellant,
The City of Los Angeles.

ROGER ARNEBERGH,
Appellant in Propria Persona,

WALHFRED JACOBSON,
City Attorney,

Attorney for the Appellant,
The City of Long Beach.

WALHFRED JACOBSON,
Appellant in Propria Persona,

Of Counsel:

LESLIE E. STILL,
Deputy City Attorney,
City of Long Beach,

SUPREME COURT, U.S.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 656

THE CITY OF LOS ANGELES, a municipal corporation, the CITY OF LONG BEACH, a municipal corporation, ROGER ARNEBERGH, WALFRED JACOBSON,

Appellants,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and C. LYN FOX, PETER E. MITCHELL, MATTHEW J. DOOLEY, THEODORE H. JENNER and EVERETT C. McKEAGE, as members of and constituting the said Public Utilities Commission,

Appellees.

On Appeal from the Supreme Court of the State of California.

BRIEF AMICI CURIAE OF THE CITIES OF AZUSA, BERKELEY, BEVERLY HILLS, BURBANK, CULVER CITY, FRESNO, GLENDALE, MODESTO, OAKLAND, PASADENA, POMONA, SACRAMENTO, SAN DIEGO, SAN FERNANDO AND TORRANCE, MUNICIPAL CORPORATIONS OF THE STATE OF CALIFORNIA.

HARRY C. WILLIAMS,
City Attorney, Azusa, California

FRED C. HUTCHINSON,
City Attorney, Berkeley, California

ROBERT E. MICHALSKI,
City Attorney, Beverly Hills, California

ARCHIE L. WALTERS,
City Attorney, Burbank, California

M. TELLEFSON,
City Attorney, Culver City, California

JOHN H. LAUTEN,
City Attorney, Fresno, California

HENRY McCLERNAN,
City Attorney, Glendale, California

ALLEN GRIMES,
City Attorney, Modesto, California

JOHN W. COLLIER,
City Attorney, Oakland, California

FRANK L. KOSTLAN,
City Attorney, Pasadena, California

ARLO E. RICKETT, JR.,
City Attorney, Pomona, California

EVERETT M. GLENN,
City Attorney, Sacramento, California

JEAN DU PAUL,
City Attorney, San Diego, California

NEVILLE R. LEWIS,
City Attorney, San Fernando, California

STANLEY E. REMELMEYER,
City Attorney, Torrance, California

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 656

THE CITY OF LOS ANGELES, a municipal corporation, the CITY OF LONG BEACH, a municipal corporation, ROGER ARNEBERGH and WALHFRED JACOBSON,

Appellants,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and C. LYN FOX, PETER E. MITCHELL, MATTHEW J. DOOLEY, THEODORE H. JENNER and EVERETT C. McKEAGE, as members of and constituting the said Public Utilities Commission,

Appellees.

On Appeal from the Supreme Court of the State of California.

BRIEF AMICI CURIAE OF THE CITIES OF AZUSA, BERKELEY, BEVERLY HILLS, BURBANK, CULVER CITY, FRESNO, GLENDALE, MODESTO, OAKLAND, PASADENA, POMONA, SACRAMENTO, SAN DIEGO, SAN FERNANDO AND TORRANCE, MUNICIPAL CORPORATIONS OF THE STATE OF CALIFORNIA.

INTEREST OF AMICI CURIAE.

Each of the cities joining in this *amici* brief is a municipal corporation of the State of California. Azusa, Beverly Hills, Burbank, Culver City, Glendale, Pasadena, San Fernando and Torrance are within the Los Angeles Extended Area, and they and their

industrial, commercial and individual residents are directly and adversely affected by Decision No. 55936 of the California Public Utilities Commission. Berkeley, Fresno, Modesto, Oakland, Pomona, Sacramento and San Diego are not within the Los Angeles Extended Area, but their interest, like the interest of the *amici* cities that are within the Los Angeles Extended Area, is in the basic question presented—the right of public utility customers, under the Fourteenth Amendment, to a full due process hearing upon a proposal that a state public utilities commission authorize a final increase in charges which such customers must pay.

This brief is filed pursuant to Rule 42(4) of this Court. The *amici* are political subdivisions of the State of California within the meaning of Rule 42(4), and this brief is sponsored by their authorized law officers.

The essential question involved upon this appeal does not affect the appellants only: it vitally affects practically every other individual and nearly every other city in the State of California. If the judgment below were to stand, the California Public Utilities Commission would inescapably be assured that it is fully possessed of unlimited power to authorize final increases in utility charges without any notice or hearing. It would then have to be expected that thereafter the California Commission would exercise such *ex parte* powers with increasing frequency, that it would increasingly rebuff the efforts of California cities and others to bespeak the customers' interests,

and that finally rate increase proceedings would be conducted *in camera,* thus subverting essential principles of sound public administration, with incalculable harm to the public interest.

For these reasons the *amici* cities file this brief in support of the Court's taking jurisdiction and proceeding after a hearing upon the merits to a reversal of the judgment below.

SUMMARY OF ARGUMENT.

Customers of a regulated public utility are deprived of their properties without due process of law, in violation of the Fourteenth Amendment, if a state commission authorizes final increases in the utility's charges, where adequate notice of the increase proposal is not given, where evidence is not adduced in an open hearing, with an adequate opportunity for cross-examination, where there is not an adequate opportunity for the affected customers to offer evidence, or where otherwise a full due process hearing is not had.

If the judgment below were to stand and were to be followed elsewhere, the California Public Utilities Commission and every similar commission in the United States could proceed without hindrance by the Fourteenth Amendment to authorize final increases in utilities' charges without affording a due process or any other hearing to the affected customers.

If it were to be said that the California Commission and other commissions would nevertheless hold

hearings in most instances, the answer would be found in the lessons of history that men endowed with unrestricted power soon come to believe in their own omniscience and their own eternal rectitude.

If it were to be said that remedies may be found in appeals to the legislatures, a sufficient answer appears in the record below: although Section 728 of the California Public Utilities Code requires a full hearing, Decision No. 55936, Decision No. 56048 and Decision No. 56049 of the California Public Utilities Commission nullify that legislative requirement, and the judgment below sustains that action.

Thus, it is essential that this Court require obedience by California to the commands of the Fourteenth Amendment, by asserting its jurisdiction and reversing the judgment below.

ARGUMENT.

I. THE FOURTEENTH AMENDMENT INSISTS UPON A FULL DUE PROCESS HEARING BEFORE INCREASES IN PUBLIC UTILITY CHARGES CAN BE FINALLY EFFECTED BY ADMINISTRATIVE STATE ACTION. THE JUDGMENT BELOW MUST FALL, SINCE IT IGNORES THAT REQUIREMENT.

As shown by the appellants in their jurisdictional statement, three other telephone companies walked into an initial hearing upon a rate increase proposal of a fourth telephone company and joined with it in a motion, without prior notice, that the California Public Utilities Commission authorize annual increases of more than $15,000,000 in charges to cus-

tomers in the Los Angeles metropolitan area. The Commission entertained that motion over the appellants' objections, received a limited amount of evidence in its support, and on December 10, 1957, granted the motion by its Decision No. 55936.

The Commission thereafter continued its hearings, received a large volume of evidence upon the very issues raised by the motion for "interim" relief, and on May 6, 1958, entered its final determinations by its Decision No. 56652. In the meantime the four companies' customers in the Los Angeles area had paid some $5,000,000 in increases of charges, by the force of the "interim" order.

One would indulge in fantasy to suppose that the Commission would overrule its interim determination under such circumstances, for it had not provided for refunds in such an event, and California law would inhibit complaints by the customers to recover the sums thus unjustifiably extracted from them (California Public Utilities Code, Sections 734 and 1709: appellants' Jurisdictional Statement, Appendix (G), pp. 73 and 76).

Any such hope would in fact have been vain, for the Commission did conclude in its final order that according to the evidence finally adduced upon the whole record, its "interim" decision upon the partial evidence before it some seven months earlier had indeed been warranted.

Nearly forty years ago this Court held in *Hollis v. Kutz* (1921), 255 US 452, 65 L ed 727, 41 S Ct 371, that the customers of a regulated public utility are

protected by the Constitution, and in *Wichita Railroad & Light Co. v. Public Utilities Commission* (1922), 260 US 48, 67 L ed 124, 43 S Ct 51, that such customers must be afforded a hearing with all of the incidents of due process, before the utility's charges to them can be finally increased by state action.

The California Commission's action here clearly contravenes those decisions and violates the appellants' Fourteenth Amendment rights. The judgment below sustained that action and consequently it should be reversed by this Court.

II. THE APPEAL RAISES SUBSTANTIAL FEDERAL QUESTIONS.

The mere statement of the facts shows that the judgment below conflicts with this Court's decisions and demonstrates violation of the appellants' Fourteenth Amendment rights, so upon that basis alone the questions presented are obviously so substantial as to fully support this Court's consideration on the merits.

Beyond the impact of the judgment upon the appellants and the other customers in the Los Angeles area whom they represent, however, is the importance of an unequivocal determination by this Court to sound public utility regulatory proceedings in California and throughout the nation.

Each of the *amici* cities has in the past appeared as a party in rate proceedings before the California

Public Utilities Commission, in its own behalf and as the representative of the other customers within its area.

These *amici* submit that in any quest for the facts, for truth, and for just and sound conclusions, there can be no substitute for an open hearing, with representation of adversary interests, and with full scope cross-examination and offers of evidence and of argument. In other words, "due process" is not simply a hollow phrase: it connotes at the least the minimum requirements for determining the truth and for securing justice and fair play where the force of the law is to take effect.

There can safely be no substitution of grace or privilege for absolute rights in this complex. Public Utility customers are either entitled to be heard by an administrative regulatory commission, as a matter of right, or they are not. If they are not so entitled to be heard their representations to the commission, by its mere favor, will ring hollowly indeed. Nor can it be supposed, if such be the law, that the customers will in the future stoutly assert their claims. Realism would suggest rather that the problems of regulation will then be determined in commission chambers, according to the utilities' representations alone, and that in this field at least public administration in the United States may come to resemble the promulgation of royal decrees.

Such is not the pattern of American policy, for that pattern is engraved in the due process and equal protection requirements of the Fourteenth Amendment.

CONCLUSION.

Decision No. 55936 of the California Public Utilities Commission deprived the appellants and those they represent of their properties without due process of law, and denied them the equal protection of the laws. The judgment of the Court below, refusing to review and annul that decision, extended judicial approval to these Fourteenth Amendment violations, and it should be reversed by this Court.

Respectfully submitted,

HARRY C. WILLIAMS,
City Attorney, Azusa, California

FRED C. HUTCHINSON,
City Attorney, Berkeley, California

ROBERT E. MICHALSKI,
City Attorney, Beverly Hills, California

ARCHIE L. WALTERS,
City Attorney, Burbank, California

M. TELLEFSON,
City Attorney, Culver City, California

JOHN H. LAUTEN,
City Attorney, Fresno, California

HENRY MCCLERNAN,
City Attorney, Glendale, California

ALLEN GRIMES,
City Attorney, Modesto, California

JOHN W. COLLIER,
City Attorney, Oakland, California

FRANK L. KOSTLAN,
City Attorney, Pasadena, California

ARLO E. RICKETT, JR.,
City Attorney, Pomona, California

EVERETT M. GLENN,
City Attorney, Sacramento, California

JEAN DU PAUL,
City Attorney, San Diego, California

NEVILLE R. LEWIS,
City Attorney, San Fernando, California

STANLEY E. REMELMEYER,
City Attorney, Torrance, California

EVERETT M. GLENN,
City Attorney, Sacramento, California,
and Member of the Bar of
The Supreme Court of The United States.

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IN THE

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OCTOBER TERM, 1958
No. 656

THE CITY OF LOS ANGELES, etc., *et al.*,

Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *et al.*,

Appellees.

On Appeal From the Supreme Court of the State of California.

Brief of the American Civil Liberties Union of Southern California, Amicus Curiae.

Interest of Amicus Curiae.

The American Civil Liberties Union of Southern California (here designated A. C. L. U.), appears as *amicus curiae* in support of the position asserted by appellants. This brief is filed with the consent of the parties, through their attorneys, pursuant to Rule 42(1) of this Court.

The A. C. L. U. is a non-profit organization dedicated to the preservation and extension of civil liberties to the farthest extent compatible with a reasonable conception of order. The instant case appears to the A. C. L. U. to involve a fundamental question of due process of law. Hence it files this brief herein.

Statement of the Case.

Amicus curiae relies on the Jurisdictional Statement of appellants and adopts appellants' formulation of the Question Presented.

Argument.

Where the property of individual citizens or groups of individual citizens is adversely affected by the acts of a governmental agency, it is of great importance that these acts be done in a manner consistent with due process. Otherwise basic constitutional guarantees may be emasculated thereby.

It requires no argument to support the assertion that a large part, if not all, of our population makes constant use of the services of the Telephone Companies as well as other utilities. It is for this reason that such services are called "*public* utilities" and that they are subject to extensive regulation. Such regulation is acceptable (and constitutional) only because such services affect genuine public interests.

To the extent to which telephone rates are set so low as to prevent a reasonable profit by a privately-owned telephone company or to force that company out of business, such low rates adversely affect a property interest of that company; conversely, to the extent to which such rates are set so high as to afford the company a more than reasonable profit at the expense of the customers, high rates adversely affect a property interest of the customers. The essential result is the same, varying only in degree, whether the rate so set be permanent or interim in duration.

It follows that the procedures of the rate fixing agency must conform to established standards in order to guarantee that no person shall be deprived of property without due process of law.

There are numerous reported cases spelling out the principle that an affected public utility company is entitled to all of the elements of due process in the course of rate-fixing by a regulatory agency:

Chicago, Milwaukee & St. Paul Railway v. Minnesota, 134 U. S. 418, 548;

West Ohio Gas Co. v. Public Utilities Commission Ohio, 294 U. S. 63;

Railroad Commission of California v. Pacific Gas & Electric Company, 302 U. S. 388;

Market Street Railway Co. v. Railroad Commission, 24 Cal. 2d 378.

It is difficult to conceive a situation in which constitutional guarantees would protect one set of persons whose property rights were affected by a particular proceeding and these same guarantees would be unavailable to another set of persons whose property rights were thereby equally affected.

The essential elements of due process have frequently been catalogued. No summary, however cursory, would omit reasonable notice followed by an opportunity to be heard so that affected persons are afforded the chance to offer evidence and to test the validity of the facts and contentions of those presenting an opposing view.

In the proceedings before the Public Utilities Commission of California here in issue, it is a matter of record that the Motion for Interim Rate Relief submitted on be-

half of four companies was entertained in a hearing in which an Application for a regular rate increase had been duly filed on behalf of only one company (App. Juris. State., Appx. B). The "hearing" on the Motion for Interim Rate Relief proceeded forthwith. No notice at all was given to those who would be required to pay the increased rates. Such ommission falls far short of the standard that, where feasible, "notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests."

Walker v. Hutchinson, 352 U. S. 112, 115.

A hearing conducted without reasonable notice is not a hearing at all in the constitutional sense of the term.

Twining v. New Jersey, 211 U. S. 78.

Conclusion.

The Motion for Interim Rate Relief, entertained without notice of any kind to the consumers, or to their municipal or other representatives, was granted in a manner which deprived the consuming public including the two individual appellants, of property without due process of law.

In the light of the foregoing a substantial federal question is presented and probable jurisdiction should be noted.

Respectfully submitted,

A. L. Wirin,
Fred Okrand,
Richard W. Petherbridge,
Attorneys for American Civil Liberties Union of Southern California.